89-1662

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

RONALD D. CASTILLE, District Attorney
of Philadelphia County;
DONALD T. VAUGHN, Superintendent,
State Correctional Institute at
Graterford, and ERNEST D. PREATE, Jr.,
Attorney General of Pennsylvania,
Petitioners

V.

JAMES CLARK,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. May federal habeas relief be granted notwithstanding a federal habeas court's own finding that the state prisoner's delay in raising his claim has "compellingly" prejudiced the state's ability to respond?

2. Do Maleng v. Cook and Burgett v. Texas permit indirect attacks on otherwise final state court judgments where such attacks rely on grounds other than the inherent unreliability of the convictions?

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Petitioners, Ronald D. Castille, District Attorney of Philadelphia County, Donald T. Vaughn, Superintendent, State Correctional Institute at Graterford, and Ernest D. Preate, Jr., Attorney General of the Commonwealth of Pennsylvania, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Third Circuit, entered in this proceeding on December 27, 1989.

OPINIONS BELOW

The published panel opinion of the United States Court of Appeals for the Third Circuit, reversing the United States District Court for the Eastern District of Pennsylvania and granting the petition for habeas corpus, is reprinted in Appendix A. The order denying rehearing is reprinted in Appendix B. The orders and memorandum of the United States District Court for the Eastern District of Pennsylvania denying the instant habeas petition appear in Appendix C.

STATEMENT OF JURISDICTION

Respondent James Clark brought this habeas corpus action pursuant to 28 U.S.C. §2254. The judgment of the United States Court of Appeals for the Third Circuit, granting habeas corpus relief, was entered on December 27, 1989.

Petitioner's request for rehearing was denied on January 25, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Habeas Corpus Statute, 28 U.S.C. §2254(a)
§2254. State custody; remedies in State courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Rule 9(a), Rules Governing Section 2254 Cases In The United States District Courts

Rule 9. Delayed or Successive Petitions

(a) Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

STATEMENT OF THE CASE

In 1974, respondent James Clark, although technically still a juvenile, was tried for two unrelated sexual assaults in the Philadelphia Court Trial Division, known informally as "adult court."[1] Choosing not to divulge his juvenile status to the courts, on May 24, 1974

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[1] A "child" for purposes of the Pennsylvania Juvenile Act is an individual under the age of eighteen years at the time a crime is committed. See 42 Pa. Cons. Stat. Ann. §6302 (Purdon 1972). Respondent was seventeen at the time the two crimes were committed, although he was eighteen at the time of the trials. The reason why his cases originated in adult court is not of record. It appears that respondent told police his age at the time he was arrested; the juvenile court records, which were available to police for confirmation, however, then listed him as nineteen years of age. See Exhibit C, at A-87-A-88. It is undisputed that respondent did not challenge the juvenile court records; neither did he produce a birth certificate or other evidence of his age until over a decade later when he sought to reduce a sentence in a subsequent case.

respondent entered a no contest plea to conspiracy and attempted rape for the first assault. Subsequently, on July 19, 1974, he was found guilty of felonious restraint after a bench trial for the second sexual assault. Respondent received lenient sentences and took no direct appeal of the convictions. He completed serving both sentences in 1978.[2]

In 1979, little more than a year after his release from state supervision,

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[2]As a first time offender in adult criminal court, respondent received a sentence of three to twenty-three months' incarceration and three years' probation for the first offense, and a concurrent sentence of eleven to twenty-three months on work release for the second offense. By way of contrast, as a juvenile with prior delinquency findings, who was also an escapee from a juvenile detention facility with a then outstanding bench warrant against him, had respondent been committed as a juvenile the juvenile authorities could have held him in a juvenile detention facility until he was twenty-one years of age.

respondent was convicted by a Philadelphia jury of rape and related charges for an attack on a Philadelphia salesgirl. After reviewing respondent's pre-sentence report, which included the two 1974 convictions, the state court, on September 17, 1980, sentenced respondent to ten to twenty years incarceration for rape and to a consecutive term of imprisonment of two to five years for felonious restraint. Respondent is currently in state custody on that sentence.

Respondent thereafter collaterally attacked the 1974 convictions in an attempt to reduce his 1980 sentences. He contended that the adult court lacked jurisdiction over him in 1974 because he was a juvenile, and that his counsel, at both the 1980 sentencing and the 1974 proceedings, had been ineffective for not

raising that claim.[3] In denying both claims, the state court found that respondent's true age had not come to the attention of either judge in adult court and, thus, that state law did not require that respondent be returned to juvenile court for a certification hearing.[4]

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[3]The Pennsylvania Constitution, Const. Sched. Art. 5, §16 (Purdon 1978), divides the Philadelphia Court of Common Pleas into three divisions with concurrent jurisdiction: Trial Division, Orphans Court Division, and Family Court Division. This provision was subsequently codified on June 27, 1978 in 42 Pa. Cons. Stat. Ann. §952. The codification reiterates that the divisions of the Court of Common Pleas are administrative units and that each division is vested with full jurisdiction of the whole Court.

[4]Where proceedings against juveniles are initiated by delinquency petitions in juvenile court, the case may be transferred to adult court after a certification hearing in which the prosecution produces evidence to demonstrate that the juvenile is not amenable to treatment at a juvenile facility. See 42 Pa. Cons. Stat. Ann. §6355 (Purdon 1972). Where, as instantly, (Footnote Continued)

In October, 1985, respondent filed federal habeas corpus petitions challenging the 1974 convictions on the jurisdictional and ineffectiveness grounds raised in state court. The magistrate recommended that relief be granted based on a Kent v. United States, 383 U.S. 541 (1961), due process violation which had not been asserted by respondent. The District Court rejected that recommendation and denied relief. Respondent then appealed.

(Footnote Continued)
proceedings against juveniles originate in adult court, state law requires a remand of the proceedings to juvenile court only where it "appears" to the adult court that the "defendant is a child." 42 Pa. Cons. Stat. Ann. §6322 (Purdon 1972). Even where the adult court's judgment as to a defendant's age proves by hindsight to have been erroneous, where the juvenile offers neither correction nor objection, the failure to transfer a case to juvenile court is not error under Pennsylvania law. See Commonwealth v. Sims, 379 Pa. Super. 252, 549 A.2d 1280 (1988).

The United States Court of Appeals for the Third Circuit reversed the District Court and ordered resentencing in the 1980 conviction based on the purported Kent due process violation. Recognizing that the due process claim had not been raised in state court, the Third Circuit found that the claim was defaulted in state court and concluded, erroneously, that the claim was thereby reviewable in federal court.[5] Specifically, the court found that 42 Pa. Cons. Stat. Ann. §9543(b) would bar state review of the

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[5]Inexplicably, the court reached this conclusion without ever addressing the cause and prejudice standard required for procedurally defaulted claims, improperly allowing habeas relief even though respondent never alleged or proved cause for his default. See Teague v. Lane, 109 S.Ct. 1060, 1067-1069 (1989); Wainwright v. Sykes, 433 U.S. 72 (1977). The Third Circuit's result is thus in direct conflict with this Court's decision in Teague.

claim because: (a) the sixteen-year delay in raising the claim was "self-evident;" (b) at all times respondent knew of the crucial facts underlying the claim, and (c) the prejudice to the Commonwealth was "compelling." "[G]iven the death of the trial judge involved and the destruction of the relevant stenographic notes, to now defend against this issue in a collateral proceeding would be virtually impossible." Appendix A, at A-14.[6]

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[6] 42 Pa. Cons. Stat. Ann. §9543(b) states:

> (b) Exception. - Even if the petitioner meets the requirements of subsection (a), the petition shall be dismissed if it appears that, because of delay in filing the petition, the Commonwealth has been prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner. This subsection does not apply if the petitioner shows that the petition is based on grounds of which the

(Footnote Continued)

Inexplicably, given its findings, the Third Circuit granted habeas relief. In so doing, it did not address the applicability of Rule 9(a), Rules Governing Section 2254 Proceedings in the United States District Courts. Neither did it explain what factors could exempt the case from Rule 9(a), but compel application of 42 Pa. Cons. Sta. Ann. §9543(b), when both sections are based on the same factors of prejudicial delay.

In reaching the merits of respondent's due process claim, the Third Circuit, without the benefit of the state court record, also inexplicably and incredibly disregarded the findings of the state court. Based on concededly

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(Footnote Continued)
petitioner could not have had knowledge by the exercise of reasonable diligence before the delay became prejudicial to the Commonwealth.

incomplete and conflicting evidence, the Third Circuit found that the trial courts in respondent's 1974 cases should have learned of respondent's true age, although respondent did not disclose it to the courts, and that their failure to do so violated respondent's due process right to a certification hearing under Kent.[7] The

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[7]The Third Circuit's interpretation of state law is incorrect and is unsupported by any state case. Its approach places trial courts in the untenable position of risking error if they do not search for evidence of juvenile status even if no basis exists for doing so. Further such searches, requiring access to record documents containing inadmissible facts or prior convictions, could cause unnecessary and impermissible prejudice.

The federal court should not have intruded into state statutory interpretaion, especially where it also found that the state prisoner's own dilatoriness would preclude the state itself from considering such a new interpretation. The Court's error was particularly egregious given that an evidentiary record cannot now be made to

(Footnote Continued)

court then granted relief based on United States v. Tucker, 404 U.S. 443 (1973), which permitted sentencing relief based on a violation of Gideon v. Wainwright, 372 U.S. 335 (1965). In so doing it concluded that the Kent due process violation which it found had here occurred rose to the level of the Gideon deprivation at issue in Tucker. Appendix A, A-44 - A-45.

(Footnote Continued)
determine whether the state courts had engaged in such a search or even whether there had been a discussion regarding petitioner's age by the courts.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW TO RESTORE FINALITY TO STATE JUDGMENTS, WHICH THE THIRD CIRCUIT'S OPINION HERE HAS FUNDAMENTALLY THREATENED, AND TO RESOLVE THE DIRECT DECISIONAL CONFLICT AMONG THE CIRCUITS ON THE EXTENT TO WHICH PRIOR OTHERWISE FINAL CONVICTIONS MAY BE SUBJECT TO REOPENED ATTACK.

Vital to the effectiveness of a state's judicial system is confidence in the finality of its judgments. As this Court has recognized, "[a]t some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation." Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (Powell, J., concurring opinion). That state interest is directly and compellingly threatened by the Third Circuit decision here at issue.

Last term in Maleng v. Cook, 109 S.Ct. 1923 (1989), this Court reviewed issues strikingly similar to those raised here. The Maleng court approved, in principle, review under Burgett v. Texas, 389 U.S. 109 (1967), and its progeny for habeas challenges to prior convictions which enhance a current sentence. Citing Rule 9(a), however, it expressly left open the question of the extent to which prior convictions were subject to such attacks. See Maleng v. Cook, 109 S.Ct. at 1927.

The Third Circuit opinion in this case directly raises the issue left open in Maleng in two ways. First, it granted windfall relief to this state prisoner notwithstanding its own finding of delay "compellingly" prejudicial to the state, contrary to the dictates of Rule 9(a). Further, it applied the Burgett remedy to reopen an otherwise final state judgment whose sentence had been fully

served based on a claim of constitutional error which, being unconcerned with the reliability of the factfindings, was not within the scope of Burgett's extraordinary form of review. Neither extension of the habeas remedy allowed in Maleng should be permitted to stand.

1. **Prejudicial Delay**

Unquestionably, the findings by the Third Circuit triggered the application of Rule 9(a). The court found that: (a) the due process claim had not been raised in state court, (b) "at all times" respondent knew of the crucial facts underlying the claim, (c) the sixteen year delay in pursuing the claim was "self-evident," and (d) the prejudice to the Commonwealth was "compelling" in light of the death of the trial judge and the destruction of the relevant stenographic notes, making defense against the due process claim in a collateral proceeding

"virtually impossible." No clearer finding of prejudicial delay could be imagined.

The Third Circuit's refusal to apply Rule 9(a) in these circumstances puts it in conflict with every other circuit addressing the use of Rule 9(a) upon a finding of prejudicial delay. See McGee v. Estelle, 732 F.2d 447 (5th Cir. 1984) (remand for dismissal if district court finds that delay by state prisoner prejudiced state's ability to respond to Burgett Gideon claim); Arnold v. Marshall, 567 F.2d 83 (6th Cir.), cert. denied, 455 U.S. 922 (1982) (Rule 9(a) dismissal required where state was prejudiced in its ability to respond by twenty-seven year delay in attacking a 1953 burglary conviction used to enhance a 1973 recidivist conviction); Henson v. Estelle, 641 F.2d 250, 253 (5th Cir.), reh. denied 645 F.2d 71 cert. denied, 454 U.S. 1056 (1981)

(Rule 9(a) dismissal required where eighteen-year delay in attack on guilty plea prejudiced government in its ability to respond); Honeycutt v. Ward, 612 F.2d 36 (2d Cir.), cert. denied, 446 U.S. 985 (1980) (prejudicial delay to state under Rule 9(a) required dismissal of a Burgett lack of counsel claim).

The Third Circuit's failure to apply Rule 9(a) instantly virtually eliminates the possibility of finality in state criminal judgments. Prisoners serving long prison terms or life sentences may unilaterally shorten those sentences simply by alleging spurious or fraudulent claims, against which the state is powerless to defend due to the unavailability of records or testimony from officials or witnesses. Indeed, success under the Third Circuit ruling is truly limited only by the imagination of the incarcerated prisoner.

Even where the conviction for which a prisoner is incarcerated is itself not subject to attack by false accusations, the Third Circuit's ruling gives career criminals an incentive to attack their early convictions with fraudulent claims in the hope that their delay will prejudice the state and thus result in resentencing without reference to their prior crimes. The instant case presents such a situation.

Such results invite abuse and manipulation, as occurred instantly where respondent, who alone had the right to appeal the 1974 convictions, preserved the benefits of his lenient sentences by not appealing and then successfully foreclosed the state's use of the prior judgments for recidivist purposes by his delayed attack. Respondent, a repeat sexual offender, can now anticipate being resentenced with the benefits afforded a first time sexual

offender. Such a result serves neither the societal interest nor the rehabilitative need of the recidivist. If permitted to stand, the Third Circuit's decision will thwart implementation of the legitimate recidivist sentencing plans of the states subject to that rule. This Court's review is imperative to prevent that unwarranted intrusion into the state's criminal justice proceedings.

2. **Burgett - Tucker Review**

Similar results follow from the Third Circuit's unwarranted expansion of Burgett and Tucker to respondent's Kent due process claims.[8] Even where there

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[8]The Tucker decision, relied on by the Third Circuit, itself developed from Burgett v. Texas, 389 U.S. 109 (1967). In Burgett, prior convictions which were obtained without the assistance of counsel in violation of Gideon v. Wainwright, 372 U.S. 335 (1963), were used at trial in support of a recidivist charge. Finding a (Footnote Continued)

exists no "self-evident" and "compelling" delay, as in the present case, state interests in the finality of its judgments are gravely undermined by the expansion of Burgett which occurred in this case. Burgett and Tucker do not merely require a remedy when convictions with Gideon violations are used subsequently. Burgett and its progeny actually provide a new avenue for collateral review of the prior convictions to determine whether or not they violate Gideon. The Burgett line of cases thus create an extraordinary avenue

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(Footnote Continued)
Gideon violation to be "inherently prejudicial," the Burgett Court prohibited the use of such convictions either to support guilt or to enhance punishment in a subsequent offense, in order that Gideon not "suffer serious erosion." 389 U.S. at 116. This Court applied Burgett to invalidate a sentence enhanced by prior convictions invalid under Gideon, in United States v. Tucker, and prohibited the impeachment use of convictions with Gideon infirmities in Loper v. Beto, 405 U.S. 473 (1972).

of collateral attack; one which is outside the normal channel of review and which completely evades state procedural and waiver requirements and the policies which they advance. This Court has never extended Burgett's extraordinary remedy to constitutional claims other than Gideon.

The results of Burgett and its progeny were compelled because a Gideon violation "goes to 'the very integrity of the factfinding process' in criminal trials." Loper v. Beto, 405 U.S. at 483-4 (citation omitted). That rationale does not support similar relief for Kent due process claims, however. Such claims do not affect the reliability of the verdict or of the factfinding process, as does a Gideon violation. Indeed, respondent has never alleged any error whatsoever in the factfinding process of either 1974 conviction. The immense impact of Burgett on the finality of state judgments, and the

relatively insignificant interest of a defendant in a delayed challenge to a conviction on grounds other than its inherent unreliability, compel the rejection of the Third Circuit's broad application of Burgett.

The circuits have split over whether Burgett extends to claims other than Gideon. Indeed, the Third Circuit's opinion in the present case created an intra-circuit conflict with the Circuit's en banc decision in United States v. Graves, 554 F.2d 65 (3d Cir. 1977), which found that a Kent due process violation was not of sufficient magnitude to warrant Burgett - Tucker relief. The Fourth Circuit agreed with Graves in Grandison v. Warden, Maryland House of Correction, 580 F.2d 1231 (4th Cir. 1978), and also refused to extend Burgett to juvenile certification claims. In direct conflict are the Tenth and Sixth Circuits which

extended Burgett to claims involving juvenile court proceedings. See Rutledge v. Sunderland, 671 F.2d 377 (10th Cir. 1982); Canary v. Bland, 583 F.2d 887 (6th Cir. 1978).

Direct conflicts exist with respect to other constitutional claims as well. For example, the First and Ninth Circuits prohibited extension of Burgett - Tucker relief to fourth amendment claims, see United States v. Penta, 475 F.2d 92 (1st Cir. 1972); Tisnado v. United States, 547 F.2d 452 (9th Cir. 1976), while the Fifth Circuit permitted it. See Beto v. Stacks, 407 F.2d 313 (5th Cir. 1969). The Seventh Circuit applied Burgett to involuntary guilty plea claims, see United States v. Martinez, 413 F.2d 61 (7th Cir. 1969), while the Sixth Circuit disallowed it. See United States v. Maggard, 573 F.2d 926 (6th Cir. 1978).

These divisions reflect marked disagreement in rationale, with some circuits, such as the Sixth Circuit, finding that the failure to use conventional remedies to attack a conviction renders it presumptively valid absent the sort of obvious defect noted in Burgett. See United States v. Maggard, 573 F.2d 926 (6th Cir. 1978). Also limiting Burgett to Gideon claims are the Third Circuit in Graves, the First Circuit in Penta and the Fourth Circuit in Grandison. In contrast, the Fifth Circuit reads Burgett broadly to prohibit the use of any constitutionally invalid conviction. See Martinez v. Estelle, 612 F.2d 173 (5th Cir. 1980). Accord United States v. Burt, 802 F.2d 330 (9th Cir. 1986). Under the latter rationale, the Ninth Circuit has also extended Burgett relief to ineffective assistance of counsel claims, see United States v. Clawson, 831 F.2d 909 (9th Cir. 1987);

Brown v. United States, 610 F.2d 672 (9th Cir. 1980), and to claims of erroneous comment on a defendant's silence at trial. See United States v. Burt, 802 F.2d 330 (9th Cir. 1986).

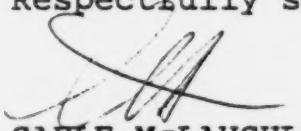
The Third Circuit's published opinion requires this Court's searching examination. Its grant of windfall relief to a state prisoner, because his own dilatoriness successfully foreclosed state response, sets a highly dangerous precedent which will stymy the state's enforcement of its criminal laws. Its unwarranted expansion of Burgett encourages endless relitigation of prior convictions for every imaginable constitutional claim, creating trials within trials and trials within sentencings. There must be a point beyond which the finality of state judgments overrides the interest in mounting attenuated, piecemeal and tangential attacks on those judgments; certainly a

point at which it overrides any interest in challenges based on spurious, fraudulent or unprovable claims. Review by this Court is essential to set those boundaries.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania, through the named petitioners, respectfully requests that a Writ of Certiorari issue to review the decision of the Third Circuit.

Respectfully submitted,



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APPENDIX "A"

Filed December 27, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1499

CLARK, JAMES
Appellant

vs.

COMMONWEALTH OF PENNSYLVANIA,
ZIMMERMAN, CHARLES and
THE ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA,
ZIMMERMAN, LEROY and
DISTRICT ATTORNEY OF PHILADELPHIA

Argued
October 30, 1989
Before: GIBBONS, Chief Judge,
MANSMANN, Circuit Judge,
and GERRY, District Judge.*
(Filed: December 27, 1989)

---

* Honorable John F. Gerry of the United States District Court for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

MANSMANN, Circuit Judge.

James Clark, a state prisoner presently incarcerated at Graterford State Prison, filed three separate petitions seeking federal habeas corpus relief. Two of the petitions, concerning 1974 convictions for which Clark has completed serving his sentences, fail to meet the threshold jurisdictional requirements of 28 U.S.C.

§§2241(c), 2254(a) (1948) that a petitioner be in custody for the allegedly defective conviction presented for scrutiny.[1] Our review is thus limited to the third petition filed by Clark regarding a 1979 conviction for which he remains incarcerated.[2]

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[1] See Maleng v. Cook, 109 S.Ct. 1923, 1925 (1989) (Court has never held that habeas petitioner is in custody when sentence imposed for particular conviction fully expired at time petition filed).

[2] Although subject matter jurisdiction is lacking over the two earlier petitions, these convictons nonetheless are subject to limited review in the third petition because of their collateral consequences on the later 1979 conviction. We are cognizant of the Supreme Court's concluding remark in Maleng:

> Our holding is limited to the narrow issue of "custody" for subject matter jurisdiction of the habeas court. We express no view on the extent to which the [earlier] conviction itself may be subject to challenge in the attack upon the [later] sentences for which it was used to enhance.

(Footnote Continued)

The essence of this petition is Clark's allegation that the judge who sentenced him for a 1979 conviction wrongly took into consideration the two previous convictions. These convictions were obtained in criminal court at a time when Clark was a juvenile, yet Clark was not afforded a hearing concerning his minor status and how his age should impact upon the criminal proceedings pending against him. Clark asserts, inter alia, that the failure to conduct such a hearing deprived him of his constitutional guarantee of due process.

Although the district court held that the alleged constitutional deficiencies

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(Footnote Continued)

Id. at 1927. Accord Carafas v. LaVallee, 391 U.S. 234, 236-38 (1968) (collateral consequences of conviction can prevent mootness of habeas petition; however, they cannot confer jurisdiction on court.) See Typescript, infra at 19-20.

were not present and that Clark's due process rights were protected during the 1974 judicial proceedings, we disagree. We conclude instead that the 1974 sentencing judge erred in not ascertaining Clark's juvenile status in light of the evidence of record. This failure denied Clark the important procedural safeguards provided to juveniles under Pennsylvania law. Thus, under the mandate of United States v. Tucker, 404 U.S. 443 (1972), the matter must be remanded for resentencing of the 1979 conviction with instruction that the 1974 convictions, obtained in violation of Clark's constitutional right to due process, not be considered in the imposition of the sentence.

I.

The historical facts surrounding the crimes committed need not be outlined in detail; rather, the post-arrest events command our attention.

On separate dates in November 1973 criminal complaints were lodged against Clark for two incidents of sexual assault. On the first offense, Clark entered a no contest plea to attempted rape and was sentenced to 3 to 23 months in prison. After a bench trial on the second offense, Clark was found guilty of felonious assault. A sentence of 11½ to 23 months imprisonment was ordered. Clark took no direct appeal from these convictions. he completed serving both sentences in 1978.

In 1979 a jury found Clark guilty of rape, indecent assault, unlawful restraint, aggravated assault and possessing an instrument of crime. On the day that Clark's post-trial motions were scheduled

for argument, he escaped. Under the dictates of the Pennsylvania fugitive forfeiture rule,[3] the pending post-trial motions were then dismissed. Upon recapture Clark was sentenced to serve 10 to 20 years for rape and to a consecutive 2 to 5 year sentence for felonious restraint. In imposing sentence, the judge took into consideration the two 1974 convictions whose sentences Clark had just finished serving. The Pennsylvania Superior Court affirmed the judgment of sentence. Commonwealth v. Clark, 300 Pa. Super. 315, 446

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[3]The Pennsylvania rule provides in relevant part:

> Rule 1972, Dispositions on Motion Subject to Rule 123..., any party may move:
>
> * * *
>
> (6) To continue generally or to quash because the appellant is a fugitive.

Pa.R.App.P. 1972.

A.2d 633 (1982). The Pennsylvania Supreme Court denied review.

Meanwhile, in October of 1980, Clark filed a petition under the then-applicable Pennsylvania Post Conviction Hearing Act ("PCHA"), 42 Pa. Cons. Stat. Ann. §9541 et seq. (Purdon 1982), challenging the jurisdiction of the trial court over his 1973 violations. The petition was later amended to allege ineffective assistance of counsel. Clark's argument against jurisdiction was that he was only 17 at the time the crimes were committed and that Pennsylvania law entitled him to a juvenile court hearing to determine whether he should have been treated as a juvenile offender or tried as an adult. See 42 Pa. Cons. Stat. Ann. §6322 (Purdon 1978). The ineffectiveness claim was related. Clark averred that representation was inadequate because his trial counsel failed to ascertain Clark's true age and was derelict in not bringing

Clark's juvenile status to the attention of the court; in sum, an allegation that counsel failed to question the trial court's jurisdiction. A post conviction hearing was held, at which Clark declined to present testimony from his 1973 trial counsel and, instead, "stood" on the record. The PCHA court found as a fact that both the trial court and counsel were unaware of Clark's actual age. Since this awareness is a requirement before a juvenile certification hearing is required under the Pennsylvania statute, the post conviction petition was denied. The Superior Court affirmed the denial of collateral relief. Commonwealth v. Clark, 344 Pa. Super. 620, 495 A.2d 610 (1985). Clark's request for allowance of appeal to the Pennsylvania Supreme Court was denied.

On October 28, 1985, seven years after he completed serving his sentences for the 1974 offenses, Clark filed two federal

habeas petitions challenging those convictions. In 1986, he filed a third petition asserting that the 1980 sentence ordered for his 1979 conviction was unconstitutionally imposed as it was based upon infirmities in the two 1974 convictions. He also raised the argument that his counsel was ineffective in the 1979 case for failure to request reinstatement of his post-trial motions after his recapture and for not raising the illegality of the 1974 adult convictions. The three petitions were consolidated.

On August 24, 1987, a United States magistrate recommended that the petitions be provisionally granted and the matter remanded for the state court to hold a certification hearing on the two 1974 convictions. Then, if the court of common pleas determined that the waiver of juvenile court jurisdiction was improper, the magistrate advised that the 1974

convictions should be vacated and Clark resentenced without consideration of these illegally obtained convictions.

Both the government and Clark filed objections to the magistrate's report.[4]

On May 31, 1989, the district court rejected the magistrate's recommendation. The two petitions concerning the 1974 convictions were denied on jurisdictional grounds. As to the third petition concerning the 1980 sentence, the district court first determined that the statutory exhaustion of state remedies requirement was satisfied with regard to the issue of the application of the Pennsylvania fugitive forfeiture rule. The district court did

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[4]Clark objected to the report because it failed to require that the de novo certification hearing be held within a reasonable time. This objection was tacitly dismissed by the district court's reversal of the magistrate's recommendation.

not address the exhaustion question posed concerning the due process claim.

Next, regarding waiver, the district court decided that the state court dismissal of the then-pending post-trial motions occasioned by Clark's flight from the jurisdiction, constituting a procedural default under the Pennsylvania fugitive forfeiture rule, did not preclude federal review of Clark's habeas claims.

Having overcome these procedural obstacles, the district court proceeded to the merits of the remaining petition. Despite its conclusion that under United States v. Tucker, 404 U.S. at 448, the 1974 convictions were reviewable, the district court decided that Clark's substantive allegations were meritless. Specifically, the district court held that the failure to hold a juvenile certification hearing in the 1974 cases did not violate Pennsylvania law nor did it deny Clark due process. As

to the ineffectiveness claim, the district court found that trial counsel's failure to ascertain his client's actual age did not constitute constitutionally inadequate representation because Clark failed to show both prongs of the Strickland v. Washington, 466 U.S. 668 (1984) test -- incompetence of counsel and prejudice resulting from an allegedly deficient performance. Finally, the district court rejected the claims that counsel was ineffective at the sentencing of the 1979 case. The district court found probable cause to appeal. We have jurisdiction pursuant to 28 U.S.C. §§1291, 2253 and exercise plenary review over the legal questions presented.

II.

As is often the case in habeas petitions presented for federal review, this matter poses questions of jurisdiction, exhaustion and procedural default. Here these issues are not dispositive,

nonetheless, [they] are perplexing enough to warrant some discussion. [sic]

A. **Jurisdiction**

In light of the Supreme Court's recent decision in Maleng v. Cook, 109 S.Ct. 1923 (1989), Clark now concedes that he is no longer in custody as a result of the 1974 convictions and, accordingly, admits that the district court does not have jurisdiction to consider the merits of those petitions. The reviewability of those convictions nonetheless remains before us, as discussed infra, because of their collateral enhancement consequences on the 1980 sentence.

B. **Exhaustion**

First, we address the exhaustion question summarily as it arises in the context of the fugitive forfeiture rule. The district court agreed with the magistrate that the impact of the application of the Pennsylvania fugitive forfeiture rule,

occasioning a state procedural default, was not an issue subject to the exhaustion requirement. The district court reasoned that because Clark had not raised the issue of the applicability of the rule as an independent basis seeking relief but, rather, invoked it only as a response to the government's assertion that he committed a procedural default which bars habeas relief, he need not have exhausted this by direct review.

The government did not cross-appeal concerning the district court's determination and we are satisfied that the district court's conclusion in this regard was correct.

The government contended, however, at oral argument before us, that Clark's request for relief on due process grounds, occasioned by the failure to provide him with a certification hearing to determine his juvenile status, was not exhausted.

According to the government, this claim was raised in the state courts only as a jurisdictional issue, i.e., because of Clark's juvenile status, the court of common pleas did not have jurisdiction over him.

Although the district court did not address whether Clark exhausted the claim, we find that this question poses a significant problem requiring discussion in some detail.

That 28 U.S.C. §2254(b) embodies the requirement that state remedies must be completely exhausted before federal courts will grant habeas corpus relief needs no further elaboration. But how this requirement is satisfied is not so readily ascertainable. Picard v. Connor, 404 U.S. 270, 275 (1971), instructs us to question if the federal claim has been fairly presented to the state courts. In determining what constitutes a fair presentation, we must

inquire whether the claim presented to the state court is the substantial equivalent of that presented in the federal habeas corpus petition. Id. at 278.[5] This requires "'a searching scrutiny by the federal habeas court of the points that were raised in the state tribunals, in order to ensure that the state system was granted a fair opportunity to confront arguments that are propounded to the federal habeas courts.'" Bisaccia v. Attorney General of State of New Jersey, 623 F.2d 307, 310, cert. denied, 449 U.S. 1042 (1980) quoting, Zicarelli v. Gray, 543 F.2d 466, 472 (3d Cir. 1976) (in banc).

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[5]The Court in Picard carefully noted that: "[We] do not imply that respondent could have raised the [constitutional] claim only by citing 'book and verse on the federal constitution.' (Citations omitted.) We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts." Id. at 278.

In Duttry v. Petsock, 878 F.2d 123 (3d Cir. 1989), we reiterated the necessity for the district court to review the state court records relevant to exhaustion to determine if that jurisdictional requirement is satisfied. If the district court has been remiss in this obligation, the matter must be remanded so that the search be accomplished. See also Ross v. Petsock, 868 F.2d 639, 643 (3d Cir. 1988), Gibbons, C.J., dissenting, (disagreeing with majority's, albeit disapproving, excusal of district court's failure to comb state court record).

It is problematic that the record here does not show whether the district court reviewed the state court record for purposes of determining the due process exhaustion issue. Given the age of this matter, we are, however, very reluctant to remand on this limited question since such an action would cause further delay and

potentially yield yet another appeal. Nonetheless, we will not overstep our review boundaries; we are not the proper tribunal to undertake an independent search of the record. Instead, we seek alternate recourse to resolve the exhaustion issue and find an avenue provided by our recent decision in Peoples v. Fulcomer, 882 F.2d 828 (3d Cir. 1989).

In Peoples, a case revisited by us on remand from the Supreme Court, we observed that a petitioner's claim can be considered exhausted when it is clear that it would be procedurally barred under Pennsylvania law. Id. at 830. We took our lead from the Supreme Court's language in its review of the matter in Castille v. Peoples, 109 S.Ct. 1056 (1989). There the Court announced that the customary bar to federal review caused by failure of presentation of a particular claim to the state courts may not be present if the petitioner's claim

would now be procedurally barred under state law. Id. at 1060. See also Teague v. Lane, 109 S.Ct. 1060, 1068 (1989) (state collateral relief not available for non-exhausted habeas claim, thus, exhaustion satisfied under 28 U.S.C. §2254(b)).[6]

We then turned, as we do now, to the newly revised Pennsylvania statute governing such collateral actions. Pennsylvania's prior Post-Conviction Hearing Act had been modified in part, repealed in part, and renamed the Post-Conviction Relief Act, 42 Pa. Cons. Stat. Ann. §9541 et seq. (Purdon Supp. 1989)("PCRA"). We viewed the PCRA as incorporating a preference that Pennsylvania courts confront

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[6]Perhaps the better reading of Peoples, Castille and Teague is that a futile return to the state court system excuses, not satisfies, exhaustion.

post-conviction challenges. Peoples, 882 F.2d at 832, n.2.

With this preference in mind and noting dismay for the necessary conjecture, we trace the probable path Clark's current claim would travel in the current Pennsylvania post-conviction system. Under the PCRA, Clark must plead and prove a number of matters relevant to the alleged due process violation before establishing eligibility for relief. Under 42 Pa. Cons. Stat. Ann. §9543(a) Clark must demonstrate by a preponderance of the evidence that he is currently serving a sentence for conviction of the crime which, in this case, arose from a violation of the Constitution of the United States which would require

the grant of federal habeas relief. §9543(a)(i)(1), (a)(2)(v).[7]

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[7]Although it would appear that §9543(a)(2)(vii), providing relief if the sentence resulted from a proceeding in a tribunal without jurisdiction, might also be applicable, this means for relief is unavailable because Clark is not currently serving a sentence for those offenses committed while a juvenile. Indeed, Clark's "no longer in custody" status is one of the reasons why Clark's 1980 PCHA petition was denied by the Philadelphia County Court of Common Pleas and by the Pennsylvania Superior Court. Commonwealth v. Clark, 344 Pa. Super. 620, 495 A.2d 610 (1985). Although under Pennsylvania law the fact that a PCHA petitioner has completed his sentence will not result in an absolute bar if there is an allegation that there exists the possibility of criminal consequences arising directly from the prior conviction, Commonwealth v. Rohde, 485 Pa. 404, 402 A.2d 1025 (1979), Clark did not pursue this argument in the Pennsylvania courts. In his brief to the PCHA court, Clark did advance a related argument that counsel was ineffective for failing to request that his case be transferred to the Family Court Division and in support claimed that one of the benefits of juvenile adjudication was the absence of collateral consequences from such an adjudication. Clark abandoned this argument before the Superior Court. The Superior Court nonetheless commented that

(Footnote Continued)

Next, Clark must show, under §9543(a)(3):

> (3) That the allegation of error has not been been previously litigated and one of the following applies:
>
> (i) The allegation of error has not been waived.
>
> (ii) If the allegation of error has been waived, the alleged error has resulted in the conviction or affirmance of sentence of an innocent individual.
>
> (iii) If the allegation of error has been waived, the waiver of the allegation of error during pretrial, trial, post-trial or direct appeal proceedings does not constitute a State procedural default barring Federal habeas corpus relief.

42 Pa. Cons. Stat. Ann. §9543(a)(3).

A claim has been previously litigated if:

> (1) it has been raised in the

(Footnote Continued)
if possible collateral consequences are alleged from a conviction whose sentence has been satisfied, relief is not necessarily barred. The court then noted that Clark merely alluded to such consequences in his ineffectiveness argument, but did not pursue it on appeal.

> trial court, the trial court has ruled on the merits of the issue and the petitioner did not appeal;
>
> (2) the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue; or
>
> (3) it has been raised and decided in a proceeding collaterally attacking the conviction or sentence.

42 Pa. Cons. Stat. Ann. §9544(a)(1).

The direct language of §9544's definition of "previously litigated" belies the difficulty of applying its guidelines to Clark. Also, the irony of the requisite to examine the state court proceedings to ascertain whether Clark's claim has been previously litigated or waived is apparent. This is the exact activity spurned by us in announcing our reluctance to usurp the district court's role in finding exhaustion. Fortunately, we need not resolve the paradox since it is our opinion that the overriding exception barring entitlement to

relief under the PCRA, prejudice to the Commonwealth, exists.

42 Pa. Cons. Stat. Ann. §9543(b) reads:

> (b) Exception. - Even if the petitioner meets the requirements of subsection(a), the petition shall be dismissed if it appears that, because of delay in filing the petition, the Commonwealth has been prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner. This subsection does not apply if the petitioner shows that the petition is based on grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the delay became prejudicial to the Commonwealth.

Here, both the delay, 16 years since the alleged due process violation, and the prejudice to the Commonwealth are present. The delay is self-evident and the prejudice to the Commonwealth is compelling. Although our issue is confined to the impact of the 1973 proceedings upon the 1980 sentence, the facts and circumstances surrounding the 1973 proceedings are

dispositive of whether Clark's due process rights were violated. Given the death of the trial judge involved and the destruction of the relevant stenographic notes, to now defend against this issue in a collateral proceeding would be virtually impossible. Nor is this an instance where Clark did not have knowledge of the relevant facts before the delay became prejudicial. Granted he did not know precisely that the 1980 sentencing court would consider his earlier convictions, yet he knew at all times of the crucial underlying fact of his status as a juvenile at the time of the proceeding and the court and his counsel's failure to become aware of this factor.

It is our opinion that the Pennsylvania court would not entertain Clark's petition at this late date. Indeed, nine years earlier, the delay in filing his 1980 petition had been previously referred to and considered detrimental to the success

of his claim. To return to the Pennsylvania courts would thus be a futile exercise allowing excusal of the exhaustion requirement as per Castille v. Peoles, 109 S.Ct. at 1060 and Peoples v. Fulcomer, 882 F.2d at 830.

C. **Procedural Default**

The government also did not specifically cross-appeal the district court's determination that the Pennsylvania fugitive forfeiture rule did not constitute a procedural default of Clark's federal habeas claims. In a footnote the government contends that review of the issue is nonetheless proper since we may affirm the lower court on any basis. Because the district court's conclusion on this issue, although correct, requires clarification, we dicuss it briefly.

Before the district court the government argued that Clark's escape after his 1979 conviction constituted a procedural

default which bars review of the issues raised. The chronology of events is pertinent: after Clark was convicted in 1979 of rape, robbery, unlawful restraint and possession of an instrument of a crime, he timely filed post-trial motions. On September 26, 1979, the day scheduled for oral argument of these motions, Clark escaped. The post-trial motions were then dismissed, we assume by motion of the government under Rule 1972. Clark was recaptured on July 25, 1980 and sentenced for the 1979 offenses on September 17, 1980. The Superior Court affirmed the judgment of his sentence on June 4, 1982 and the Supreme Court denied allocatur. Clark has remained in custody since his apprehension.

Whether Clark's escape equates to a procedural default foreclosing federal habeas review is governed by whether our opinion in Fiegley v. Fulcomer, 833 F.2d 29

(3d Cir. 1987) controls.[8] In Fiegley, we opined that an escape constitutes a knowing decision by the prisoner that he will not abide by the outcome of that court's lawful processes. Thus, we reasoned that it was unlikely that such a prisoner could ever be able to show "cause," see Wainwright v. Sykes, 433 U.S. 72 (1977), for procedural default. Feigley, 833 F.2d at 31. We thereby decided that by escaping during the pendency of his state post-conviction

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[8] Fiegley confronted what was then a matter of first impression in our court, i.e. whether a habeas petitioner, a prisoner who escaped and was then recaptured, satisfied the federal standard for disregarding a state law procedural bar. In answering, we applied the more liberal "cause and prejudice" standard of Wainwright v. Sykes, 433 U.S. 72 (1977) over the "deliberate by-pass" analysis of Fay v. Noia, 372 U.S. 391 (1963). Our opinion in Fiegley did not dispute that under Pennsylvania law an escapee waived the right to seek relief from Pennsylvania courts, rather, the issue was whether the state law procedural bar should be disregarded in the federal proceedings.

petitions. Fiegley waived his right to assert this claim in his federal habeas petition.

The district court here held that Feigley did not apply.[9] We agree, although on an alternate basis. We are in accord with the district court that Rule 1972's facial language, permitting any party to move to continue generally or to quash a matter because an appellant is a fugitive, provides little or no guidance as to dismissal of claims arising after recapture. Although the district court added that the case law does not distinguish

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[9]The district court engaged in a detailed analysis of whether the Pennsylvania rule provided an independent and adequate grounds for procedural default precluding us from delving into the claims of constitutional error in the state conviction. See Neely v. Zimmerman, 858 F.2d 144 (3d Cir. 1988). We have no quarrel with the district court's dissection of the issue, rather, we feel its extent was unnecessary.

between claims arising before or after recapture, this is because the rule simply does not apply to motions arising after recapture. Clark was not sentenced until he was once again apprehended. His claims for federal habeas relief, unlike those in Fiegley, are based upon events which arose at sentencing following his apprehension and do not directly concern his original post-trial motions which were forfeited when he escaped. Thus, although we agree with the district court, first, that the Pennsylvania rule does not speak in unmistakable terms and, second, that the Pennsylvania cases construing the law are not consistent, we find that it was unnecessary to confront the procedural default argument by employing the fugitive forfeiture rule when its terms were simply not operational to the claim before the 1980 sentencing court.

III.

We turn at last to the merits of the petition.

The district court made a positive determination as to reviewability of the 1974 convictions. Although these matters, lacking the "in custody" requirement of 28 U.S.C. §2254(a), were beyond the district court's direct jurisdictional constraints, under the doctrine of the United States v. Tucker, 404 U.S. at 447, they remain viable. In Tucker, a sentencing court gave specific consideration to two prior convictions which, having been obtained without the assistance of counsel in violation of Gideon v. Wainwright, 372 U.S. 35 (1963), were constitutionally infirm. The court remanded the case for resentencing because the sentence was "founded at least in part

upon misinformation of constituional magnitude." Id.[10]

Although the government conceded at oral argument before the district court that review under Tucker was appropriate, it now contends that the magnitude of error alleged here, failure of counsel to request a certification hearing, does not rise to the level of constitutional deprivation such as the right to counsel in Tucker.

The district court decided that it was not necessary to tackle the question of the extent Tucker is to be applied to cases asserting constitutional defects other than deprivation of right to counsel. Instead, the district court found that the 1974 convictions were not obtained in violation

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[10]The only relief permitted under Tucker is resentencing on the subsequent conviction. This is the only relief Clark seeks in this case.

of Clark's constitutional rights. Thus, although Tucker could trigger an evaluation of the constitutionality of the earlier sentences, it did not compel resentencing here, as the starting point, the presence of an invalid conviction, was missing.

We here part company with the district court and conclude instead that Clark was indeed deprived of his due process rights in 1973 when the trial court failed to provide him with a certification hearing. This denial of due process is a defect of constitutional magnitude which Tucker is designed to protect. Because the 1974 convictions were relied upon by the 1980 sentencing court, Clark is entitled to the relief provided by Tucker and must be resentenced.

Our decision that Clark was not afforded his due process rights emanates from our interpretation of the Pennsylvania

statute and the caselaw analyzing its constitutional breadth.

A.

Whether a juvenile certification hearing is required in Pennsylvania proceedings is controlled by 42 Pa. Cons. Stat. Ann. §6322. The statute reads in relevant part:

> §6322. Transfer from criminal proceedings.
>
> (a) General Rule [I]f it appears to the court in a criminal proceeding other than murder that the defendant is a child, this chapter shall immediately become applicable, and the court shall forthwith halt further criminal proceedings, and, where appropriate, transfer the case to the division or a judge of the court assigned to conduct juvenile hearings....

If Clark was in fact only 17 at the time of a criminal proceeding, he would be considered a child under Pennsylvania law. See 42 Pa. Cons. Stat. Ann. §6302(1) (Purdon 1978).

The record contains conflicting information as to Clark's age at the time

of the relevant criminal conduct in 1973. In two arrest reports filed by the police, Clark's birth date was recorded as March 20, 1954, which would place his age at 19 years. Two commitment orders entered in family court also state Clark's age as 19. On the opposing side, a pre-trial services report stated, "Defendant said he is only 17." On that form, petitioner's date of birth was recorded as 3/23/57. Most significantly, the criminal complaint relating to the November 5, 1973 incident contained the notation "17 N/M," law enforcement nomenclature signifying that Clark was a 17-year-old Negro male. To further even the score, on Clark's behalf, there is the fact that Clrk was indeed 17 years old at the time of the arrest, while, in the government's favor, is the state trial court's decision on the Pennsylvania post-conviction petition that the 1973 trial court was unaware of Clark's actual

age since he represented that he was older at the time. Based upon the fairly equivalent distribution of record evidence concerning Clark's age, the district court found as a fact both that Clark was 17 at the time of his arrest and that the court was not aware of Clark's actual age.

Given the disparate record evidence, we cannot adhere to the usual 28 U.S.C. §2254(d) presumption of correctness accorded to state factfinding procedures. This is simply because "the majority of facts were not adequately developed at the state court hearing." See 28 U.S.C. §2254(d)(3). The PCHA court's finding that "the Court was not aware of the defendant's actual age" is simply not borne out by the record. Granted the documentation reveals conflicting evidence as to Clark's age, but there is no evidence of willful misstatement by Clark. In fact, the pretrial services

report memorializes a directly contrary statement: "Defendant says he is only 17."

We tread cautiously in deciding exactly how this information activates application of the Pennsylvania certification statute. There is little guidance from the Pennsylvania courts as to how the statute's language is to be interpreted in this regard. Our research has not found a case delineating the scope of the trial court's obligation in divining the age of defendants. In Commonwealth v. Sims, 379 Pa. Sper. 252, 549 A.2d 1280 (1988), the Pennsylvania Superior Court, citing Commonwealth v. Harris, 223 Pa. Super. 11, 297 A.2d 154 (1972), found that the Pennsylvania statute imposes a duty to transfer a criminal proceeding to a juvenile court if "it shall be ascertained that the person charged with the offense was under the age of 16 years at the time the alleged offense

was committed."[11] In both Sims and Harris the defendants, on inquiry by the court, either misstated or refused to divulge their true ages. The court thus did not discuss the duty of the court to "ascertain" the true age of the defendants. But here, given the information indicating Clark's age as 17 included in documents which the trial court would have had before it (particularly the criminal complaint), we are constrained to conclude that the court should have been aware of Clark's juvenile status. The failure of the trial court to make any inquiry into Clark's age deprived him of the possibility of being

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[11]The court in Harris was referring to an earlier statute, 11 Pa. Stat. Ann. §256 (Purdon 1972), which has since been repealed. 42 Pa. Cons. Stat. Ann. §6301 now governs juvenile matters and defines "child" as an individual who is under the age of 18 years. 42 Pa. Cons. Stat. Ann. §6302.

adjudicated as a juvenile. The likelihood of his being so certified and the debate as to whether such an adjudication would have actually benefitted Clark are not germane. As a 17 year old, Clark was entitled to certain safeguards and the court was remiss in not, at the least, inquiring into Clark's eligibility for juvenile certification.

We next broach the question of whether the failure to provide Clark with a certification hearing deprived him of due process of law.

The seminal case on this issue is Kent v. United States, 383 U.S. 541 (1966). According to the governing statute, Kent, a juvenile, was subject to the exclusive jurisdiction of the District of Columbia juvenile division unless, after full investigation, that court should waive jurisdiction. A motion had been filed in juvenile court for a hearing on the

question of waiver and for access to the juvenile court's social service file prepared during Kent's probation for a prior offense. The juvenile court did not rule on these motions, but instead, it entered an order waiving jurisdiction accompanied by the recitation that the waiver followed the required full investigation. After Kent was indicted as an adult, he moved to dismiss the indictment, alleging that the juvenile court's waiver was invalid, presenting various arguments as to the infirmity of the proceedings by which the jurisdiction of the juvenile court was waived. Although the Supreme Court agreed that the statute contemplated that the juvenile court should have considerable latitude within which to determine whether it should retain jurisdiction over a child, it decreed that this latitude was not all encompassing. The Court concluded that the juvenile proceeding must conport

with procedural regularities sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness. Id. at 557.

In re Gault, 387 U.S. 1 (1967), provided the Supreme Court with further opportunity to outline the procedures necessary for an adjudication of delinquency. The Court re-emphasized the necessity that basic requirements of due process and fairness must be satisfied in such proceedings. Gault, 387 U.S. at 12.

We confronted the Pennsylvania juvenile's right to due process in United States ex rel. Turner v. Rundle, 438 F.2d 839 (3d Cir. 1971). In Turner, we evaluated a transfer from juvenile to criminal court and concluded that Kent, particularly in light of Gault, set forth certain principles of constitutional dimension which must be followed in connection with juvenile proceedings. We thus held that

the constitutional requirements prescribed by Kent included notice of the charges, access to certain records, the right to present evidence and cross-examine witnesses, and a statement of the reasons for the waiver. Id. at 842.

The district court here found that Turner did not hold that the due process clause requires that a transfer or certification or waiver hearing must always be conducted in a case involving a juvenile; rather, its holding and those of Kent and Gault mandate that any hearing provided by the state must contain certain procedural safeguards. Because Pennsylvania law does not require a hearing until petitioner's true age appears to the trial court, in the district court's view the trial court's failure to conduct the hearing in this case did not violate the petitioner's constitutional rights.

We have of course arrived at a different conclusion concerning the scope of the trial court's duty under these circumstances to become cognizant of Clark's status as a juvenile. Because we conclude that, under these particular facts, Clark was entitled to a certification hearing, it is axiomatic that the absence of the opportunity to be eligible for the procedural safeguards provided by the Pennsylvania statute represented a deprivation of due process. In our reading of Kent, Gault, and Turner a duty is imposed on courts to conduct juvenile proceedings which comport with general principles of due process. For the trial court not to have exercised sufficient diligence to inquire into whether a hearing was appropriate deprives a defendant of due process rights.

We further conclude that this denial of due process rises to the level of deprivation of constitutional rights

encompassed within United States v. Tucker, 404 U.S. at 449, and mandating resentencing. Two recent Supreme Court cases implicate our decision.

In Johnson v. Mississippi, 486 U.S. 578 (1988) the sentencing jury considered a New York conviction which the petitioner maintained was constitutionally invalid because he was denied his right to appeal. The questions sought to be raised in the appeal of the New York case involved the use of a coerced confession and the failure to hold a hearing on the voluntariness of the confession outside the presence of the jury. After the Mississippi death sentence was imposed, a New York court overturned the prior conviction on the basis of constitutional infirmity. On appeal of the death sentence to the Supreme Court, the Court decided that consideration of the invalid New York conviction rendered the Mississippi death sentence unlawful.

In Maleng v. Cook, 109 S.Ct. at 1927, the habeas petitioner alleged that his sentence was invalid because the court considered a prior conviction which was unconstitutioally obtained because he was mentally incompetent to stand trial. Although the Court's holding in Maleng was limited to one of subject matter jurisdiction, the outcome that resentencing under Tucker might be necessary if the conviction were ruled invalid was not questioned.

We are thus confident that an extension of Tucker to this instance wherein Clark was deprived of due process, a juvenile proceeding affording significant procedural rights is most appropriate. See Sadler v. Sullivan, 748 F.2d 820, 824, n.12 (3d Cir. 1984) (Supreme Court has held that under due process clause, fundamental fairness requires that juveniles receive benefits of essential constitutional provisions, citing, In Re Gault, 387 U.S.

at 29 (notice of charges, right to counsel, privilege against self-incrimination, right to confrontation and cross-examination); In Re Winship, 397 U.S. 358 (1970) (proof beyond reasonable doubt); Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy); see also, Schmidt v. Hewitt, 573 F.2d 794 (3d Cir. 1978) (if transfer to juvenile court confers substantial benefit, transfer hearing constitutionally required, citing Kent v. United States, 383 U.S. 541). Indeed, it is compelled.

IV.

It is undisputed that the 1980 sentencing court relied upon the prior convictions of Clark as an adult when imposing the 1980 sentence. Specifically the court stated:

> THE COURT: I also look upon it that he has that proclivity to commit a crime and that he does so with deliberateness and does so when he doesn't jeopardize himself too much, like after his parole is over.

DEFENSE COUNSEL: Maybe that means --

THE COURT: He was given a break before, and despite that he did not respond. Id. at 13-14.

THE COURT: ...I will give [Clark] the benefit of the doubt that he was not convicted of rape or attempted rape in the past, that it was felonious restraint. I will give him that, but he's committed a serious crime. He's not free of any criminal conduct, all of which I do consider. Id. at 25.

By employing the language "criminal conduct", it is apparent that the sentencing court relied upon the fact that Clark had committed previous offenses as an adult - otherwise the terminology "criminal" would not be utilized. Given this reliance, the matter must be remanded for resentencing on the 1979 conviction without consideration of the prior offenses, the punishment for which was obtained without providing Clark his constitutionally guaranteed rights of due process. We will therefore reverse the district court's order and remand with instruction for the

district court to enter an order provisionally granting the writ of habeas corpus if the Court of Common Pleas of Philadelphia County does not resentence Clark within 60 days from the date of the district court order.

A True Copy:

Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1499

CLARK, JAMES
Appellant

vs.

COMMONWEALTH OF PA, et al.

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, Chief Judge, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, Circuit Judges and GERRY, District Judge*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, a majority of the circuit judges of the circuit in regular active service not having voted for

rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

_____
Circuit Judge

*U.S. District Judge Gerry voted only as to panel rehearing.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES CLARK	:	CIVIL ACTION
v.	:	NOS. 85-6177
	:	85-6178
COMMONWEALTH OF PA, et al.	:	86-6813

MEMORANDUM

O'NEILL, J. MAY 31, 1989

Three habeas corpus petitions, which have been consolidated for review, are before me following a Report and Recommendation by the Magistrate[1] and the

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[1]The Magistrate recommended that the matter be remanded to Court of Common Pleas for Philadelphia for a hearing de novo on the issue of waiver. It is FURTHER RECOMMENDED that if the Court of Common Pleas for Philadelphia determines on the basis of the hearing that the waiver of juvenile court jurisdiction was improper, the writ of habeas corpus should issue and the petitioner's 1974 convictions be vacated and the petitioner should be resentenced
(Footnote Continued)

timely filing of objections. After conducting a de novo review of the petitions, I conclude that they should be dismissed.

The Magistrate has set forth the relevant facts in his Report and Recommendation, at 1-6, and thus I need not repeat those facts here. The petitions raise a number of issues that I will address seriatim: subject matter jurisdiction, exhaustion, procedural default and the merits of the petitions.

A. **SUBJECT MATTER JURISDICTION**

In order for this Court to possess subject matter jurisdiction over

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(Footnote Continued)
without consideration of those convictions. If after a hearing the court find [sic] that waiver was proper, it may proceed, after consideration of any motion or further proceedings, to enter an appropriate order.
Report and Recommendation, at 25-26.

these actions, the habeas petitioner must be "in custody." 28 U.S.C. §2241(c); see also 28 U.S.C. §2254(a). The petitioner must be in custody when the petition for the writ is filed. See Carafas v. LaVallee, 391 U.S. 234, 238 (1968); Pringle v. Court of Common Pleas, 744 F.2d 297, 300 (3d Cir. 1984). The relevant custody for determining subject matter jurisdiction is the custody imposed by the proceeding under attack. See United States ex rel. Pitts v. Rundle, 324 F.Supp. 480 (E.D. Pa. 1971) (citing, inter alia, Peyton v. Rowe, 391 U.S. 54 (1968)). Respondent contends that I have no subject matter jurisdiction over Civil Action Nos. 85-6177 and 85-6178 because Clark was not in custody on the challenged convictions when he filed these actions. I agree.

To satisfy the custody requirement, the petitioner must be subject to "restraints not shared by the public

generally,..." Jones v. Cunningham, 371 U.S. 236, 240 (1963); see also Barry v. Brower, 864 F.2d 294, 296 (3d Cir. 1988) (persons whose liberty is restricted are in custody).[2] "The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special

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[2]The definition of custody extends beyond actual physical custody. See, e.g., Jones, 371 U.S. at 240 (parolee); Justices of Boston Municipal Court v. Lydon, 466 U.S. 294 (1984) (petitioner released on personal recognizance awaiting trial de novo); United States ex rel. Wojtycha v. Hopkins, 517 F.2d 420, 423-24 (3d Cir. 1975) (petitioner on bail, with the execution of sentence stayed pending appeal; petitioner was placed on probation and his failure to pay costs could have resulted in incarceration).

urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." Hensley v. Municipal Court, 411 U.S. 345, 351 (1973); see also Tinder v. Paula, 725 F.2d 801 (1st Cir. 1984).

The collateral consequences[3] of a conviction can prevent a habeas petition from becoming moot; however, they cannot confer jurisdiction on the court. See Carafas, 391 U.S. at 236-38;[4] Flittie v. Solem, 867 F.2d 1053, 1055 (8th Cir. 1988);

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[3]Collateral consequences are those "disabilities or burdens [which] may flow from" a conviction. Carafas, 391 U.S. at 237.

[4]In Carafas, the petitioner was in custody when he applied for the writ of habeas corpus. 391 U.S. at 236, 239. While his application was awaiting appellate review, he completed his sentence. Id. The Court held that petitioner's release did not render his cause of action moot because of the collateral consequences flowing from the conviction. Id. at 237-38, 239.

Ward v. Knoblock, 738 F.2d 134, 138-39 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985); Tinder, 725 F.2d at 803; Cotton v. Mabry, 674 F.2d 701, 703 (8th Cir.), cert. denied, 459 U.S. 1015 (1982); Douglas v. Owens, No. 86-2494 (E.D. Pa. Feb. 17, 1987) (LEXIS, Genfed library, Dist. file); 3 W. LaFave & J. Israel, Criminal Procedure §27.8 (b), at 386-88 (1984). A collateral consequence does not constitute a sufficient restraint on liberty to satisfy the custody requirement. See, e.g., Ward, 738 F.2d at 138; Douglas, slip op. at 4-5.

Petitioner claims that he was in custody when he filed the petitions challenging his 1974 convictions because these convictions were considered when he was sentenced on the 1979 conviction.[5] The

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[5]It is undisputed that petitioner is currently in custody on the 1979 conviction.

judge referred to petitioner's criminal record during the sentencing and noted that petitioner has "that proclivity to commit a crime and that he does so with deliberateness and does so when he doesn't jeopardize himself too much, like after his parole is over." Commonwealth v. Clark, Nos. 108-114, at 14 (Phila. Ct. Common Pleas Sept. 17, 1980). The judge also noted: "he's committed a serious crime. He's not free of any criminal conduct, all of which I do consider." Id. at 25.[6]

The judge's consideration of petitioner's prior convictions is merely a collateral consequence and thus is insufficient to confer jurisdiction over the petitions. See Cotton, 674 F.2d at 703;

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[6]For a detailed discussion of the sentencing judge's consideration of petitioner's prior convictions, see Report and Recommendation, at 9 & n.4.

cf. Douglas, slip op. at 4 (prior juvenile adjudication brought to attention of sentencing judge in presentence report). It is not unusual for a sentencing judge to consider a defendant's criminal record in determining what sentence to impose. Allowing such consideration to satisfy the custody requirement would expand the definition of custody far beyond its intended meaning.

The decisions of the Court of Appeals are not to the contrary. The Court has held that "when a completed, earlier sentence which is under attack directly and indubitably affects the duration of a petitioner's confinement under a later sentence, there is no lack of custody or of jurisdiction to entertain the application for habeas corpus." United States v. Jackson, 684 F.2d 245, 247 (3d Cir. 1982) (per curiam). This "directly and indubitably" standard has been satisfied only in

cases in which invalidating the first conviction would require shortening the second sentence by giving credit for time served. See Lyons v. Brierley, 435 F.2d 1214 (3d Cir. 1970); United States ex rel. DiRienzo v. New Jersey, 423 F.2d 224 (3d Cir. 1970); see also Thomas v. Zimmerman, 583 F. Supp. 701 (E.D. Pa. 1984).[7]

Because petitioner was not in custody when Civil Action Nos. 85-6177 and 85-6178 were filed, the petitions are dismissed for lack of subject matter jurisdiction. "To decide otherwise would in [my] mind involve tenuously construing custody virtually to read the word out of

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[7]Petitioner does not contend that he would receive such a credit on the sentence for his 1979 conviction.

the statute." Rundle, 325 F. Supp. at 483 (original quotation marks omitted).[8]

B. **EXHAUSTION**

I agree with the Magistrate that the application of the fugitive forfeiture rule, a state procedural default, is an issue that petitioner did not need to exhaust. See Report and Recommendation, at 18-19.

Petitioner has not raised the issue of the applicability of the fugitive forfeiture rule as an independent habeas claim for which he seeks relief; rather, he has invoked it as a response to respondent's assertion that he committed a procedural default which bars habeas

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[8]Although I do not have jurisdiction over these actions, I may review the constitutionality of the 1974 convictions to the extent permitted by United States v. Tucker, 404 U.S. 443 (1972). See infra pp. 17-20.

relief. The consideration of whether a state procedural requirement is an independent and adequate state ground is governed by federal law. "The Supreme Court 'ha[s] consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question.'" Reynolds, 843 F.2d at 719 (citing Henry v. Mississippi, 379 U.S. 443, 447 (1965); see also Sykes, 433 U.S. at 75 n.3. In Murray v. Carrier, 477 U.S. 478, 489 (1986), the Court stated:

> The question whether there is cause for a procedural default does not pose any occasion for applying the exhaustion doctrine when the federal habeas court can adjudicate the question of cause--a question of federal law--without deciding an independent and unexhausted constitutional claim on the merits.[9]

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[9]In Carrier, the Court concluded that
(Footnote Continued)

Similarly, whether the fugitive forfeiture rule is an independent and adequate state ground is not an [sic] substantive constitutional claim and thus is properly before this court. See Bond v. Fulcomer, 864 F.2d 3061 (3d Cir. 1989) (Court of Appeals first determined whether substantive issues had been exhausted, then decided whether procedural default barred federal court's review); Swanger v. Zimmerman, 750 F.2d 291, 296-97 (3d Cir. 1984) ("Regardless of whether a petitioner has exhausted available state remedies, a default in compliance with state procedural rules for raising a claim may be an independent and adequate state ground for

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(Footnote Continued)
the defendant's claim of ineffective assistance of counsel, which may establish cause for a procedural default, must first be presented to the state courts because ineffectiveness also constitutes an independent constitutional claim. Id.

denial of federal habeas corpus relief.").[10]

C. **PROCEDURAL DEFAULT**

Respondent contends that petitioner's escape after his 1979 conviction constituted a procedural default which bars my review of the issues raised in Civil Action No. 86-6813. The Magistrate concluded that petitioner's claims were not barred by the fugitive forfeiture rule. Report and Recommendation, at 12-16. When the Magistrate filed his report, he did not have the benefit of the decisions of the Court of Appeals in Feigley v. Fulcomer, 833 F.2d 29 (3d Cir. 1987), Reynolds v. Ellingsworth, 843 F.2d 712 (3d Cir.), cert. denied, ____ U.S. ____, 109 S.Ct. 403

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[10]Because I conclude that exhaustion of the default issue was not required, I do not decide whether this issue was in fact exhausted, that is, presented to the state courts.

(1988), and Neely v. Zimmerman, 858 F.2d 144 (3d Cir. 1988). Upon consideration of these decisions as well as of the existing record, I reach the same conclusions the Magistrate on the issue of procedural default.

The chronology of events following petitioner's 1979 conviction is crucial. On July 23, 1979, petitioner was convicted of rape, robbery, unlawful restraint and possession of an instrument of a crime. He filed timely post-trial motions.[11] On September 26, 1979, the date that oral argument was scheduled on these motions, petitioner escaped. The pending post-trial motions were dismissed on November 8, 1979. Petitioner was

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[11]Exhibit B to Respondent's Memorandum on Jurisdiction and Procedural Default lists the various claims that were raised in these post-trial motions.

recaptured on July 25, 1980 and sentenced on September 17, 1980.[12] The Superior Court affirmed his sentence on June 4, 1982.[13] Petitioner has remained in custody

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[12]Petitioner was sentenced to a term of imprisonment of twelve to twenty-five years. Sentence of the Court, Exhibit A to Respondent's Memorandum on Jurisdiction and Procedural Default, at 26-28.

[13]Petitioner raised the following issues in his appeal to the Superior Court: 1) whether defendant waived his post-trial motions by escaping; 2) whether defendant was competent to stand trial; 3) whether a prospective juror who advocated castration was able to weigh the facts fairly and 4) whether it might inflame a jury to show a photograph containing the facial expression of the victim. Brief of Appellant, Commonwealth v. Clark, No. 2368 (August 1981), Exhibit B of Respondent's Memorandum on Jurisdiction and Procedural Default. He raised additional errors in a supplemental brief: 1) the sentencing judge considered an adult conviction when he was a juvenile at the time of conviction 2) trial counsel was ineffective at sentencing because he failed to ask the trial court to reinstate post-trial motions or to allow filing of new motions and 3) counsel was ineffective because he failed to present evidence or to argue that defendant was a juvenile when the prior offense was committed.

(Footnote Continued)

since his apprehension. In this habeas action, petitioner alleges that his counsel was ineffective at his sentencing in 1980, which occurred after petitioner's return to the jursidiction of the state court.[14]

(Footnote Continued)
Supplemental Brief for Appellant, Exhibit C to Respondent's Memorandum on Jurisdiction and Procedural Default.

[14]Specifically, petitioner raises the following issues relating to the 1979 conviction:

> 3. The petitioner was deprived of his right to the effective assistance of counsel in his 1979-1980 criminal proceedings by:
>
> a. his trial counsel's failure to advocate reinstatement of post-trial motions after the petitioner was returned to the jursidiction of the sentencing court; and
>
> b. his trial counsel's failure to present evidence or argue that the petitioner was a juvenile at the time of his prior offenses. The effect of counsel's error was that the sentencing judge improperly considered the prior convictions when determining the petitioner's sentence.

Report and Recommendation, at 6-7. For a discussion of these issues, see infra pp.
(Footnote Continued)

Contrary to respondent's contention, I conclude that the Court of Appeals' decision in Feigley v. Fulcomer, does not control this case. After Feigley was convicted and sentenced,[15] he filed several pro se post-conviction petitions in the Pennsylvania trial court which raised, inter alia, a double jeopardy claim. 833 F.2d at 30. While these petitions were pending, Feigley escaped. Id. The trial judge subsequently dismissed Feigley's

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(Footnote Continued)
27-28.

Petitioner admits that the fugitive forfeiture rule bars this Court's review of the validity of his conviction. Petitioner's Memorandum Sur Effect of Feigley v. Fulcomer, at 1.

[15]Initially, Feigley was sentenced to an aggregate of ten to twenty years, which was later modified by the state trial court to an aggregrate of seven to twenty years. 833 F.2d at 30. The same court then vacated the modified sentence and reinstated the initial sentence. Id. The petitioner challenged this reinstatement on double jeopardy grounds. Id.

petitions because of his escape. Id. When Feigley returned to the jurisdiction, he filed petitions under the Pennsylvania Post Conviction Hearing Act, which included the double jeopardy claim he initially raised in the trial court. Id. The state courts concluded that his escape required dismissal of these petitions as well. Id.

The Court of Appeals held that by escaping during the pendency of his state post-conviction petitions which raised his double jeopardy claim, Feigley waived his right to assert this claim in his habeas petition. Id. at 30-31. Feigley did not dispute that under Pennsylvania law an escape waived the right to seek relief from the Pennsylvania courts. Id. at 30. The issue before the Court of Appeals was

whether the state law procedural bar should be disregarded.[16]

In contrast to Feigley, it is disputed in this case whether under Pennsylvania law Clark's escape constituted a waiver of his habeas claims. The Court of Appeals' decisions in Reynolds and Neely guide my analysis of this issue. "[A] federal court must assure itself that a habeas petitioner has complied with relevant state procedural requirements before it can delve into claims of constitutional error in a state conviction." Reynolds,

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[16]In determining whether the fugitive forfeiture rule should be disregarded--a federal question--the Court of Appeals in Feigley rejected the "deliberate bypass" standard and adopted the "cause and prejudice" standard set forth in Engle v. Isaac, 456 U.S. 107 (1982), and Wainwright v. Sykes, 433 U.S. 72 (1977). 833 F.2d at 31. The Court concluded that Feigley did not meet the cause requirement because he did not proffer any reasons for his escape. Id.

843 F.2d at 717. To that end, I must resolve whether the state procedural rule is an independent and adequate state ground, an inquiry which is governed by federal law and which requires review of the state procedure as applied to the specific facts of the case. Id. If the procedural rule is not independent and adequate, "a federal court may overlook the state waiver and proceed to the merits of the petitioner's constitutional claim." Neely, 858 F.2d at 147; see also Reynolds, 843 F.2d at 717.

I must review the following factors to determine the independent/adequacy issue:

> (1) whether the state procedural requirement is stated in unmistakable terms; (2) whether the state courts have refused to review the claims on the merits; and (3) whether the state courts' refusal in this instance is consistent with other decisions.

Neely, 858 F.2d at 148 (citing Wainwright v. Sykes, 433 U.S. 72, 85-86 (1977); see also Bond v. Fulcomer, 864 F.2d 306, 311-12 (3d Cir. 1989); Reynolds, 843 F.2d at 719. I conclude that the fugitive forfeiture rule, as applied to this case, is not an independent and adequate state procedural ground that bars me from reviewing the claims set forth in Civil Action No. 86-6813.

The second requirement is clearly satisfied here. The Pennsylvania Superior Court declined to reach the merits of all but one of petitioner's claims because plaintiff escaped from custody while his post-trial motions were pending. Commonwealth v. Clark, 300 Pa. Super. 315, 446 A.2d 633, 633-34 (1982). The Court concluded that the trial court did not err in failing to reinstate Clark's post-trial motions even after he was returned to custody. Id. at 634. The Court based its

decision on, inter alia: Commonwealth v. Galloway, 460 Pa. 309, 333 A.2d 741 (1975); Commonwealth v. Albert, 260 Pa. Super. 20, 393 A.2d 991 (1978) (per curiam); Commonwealth v. Boyd, 244 Pa. Super. 98, 366 A.2d 934 (1976). The Pennsylvania Supreme Court denied Petitioner's Petition for Allowance of Appeal. See Amended Petition for Writ of Habeas Corpus, at 3.

The remaining two requirements are not met in this case, however. First, the fugitive forfeiture rule is not stated in unmistakable terms. Neither the relevant statute nor the applicable case law addresses the issue whether a habeas petitioner waives his right to litigate claims which arise after recapture. The applicable procedural rule, Pa. R. App. P. 1972(6), provides in relevant part that "any party may move:...(6) To continue generally or to quash because the appellant is a fugitive;" on its face, the Rule

provides no guidance as to dismissal of claims arising after recapture.

The case law does not distinguish between claims arising before or after recapture. I must look to the law in existence when the petitioner allegedly waived his rights. Reynolds, 843 F.2d at 722. In 1979, when petitioner escaped from the jurisdiction, it was established that when a defendant escapes after conviction, he waives his right to have his post-trial motions reviewed. See, e.g., Albert, 393 A.2d at 992; Boyd, 366 A.2d at 934-35. When the defendant is at large, the pending motions must be dismissed. See Commonwealth v. Tomlinson, 467 Pa. 22, 354 A.2d 254 (1976); Albert, 393 A.2d at 992. When the fugitive returns to the jurisdiction, the Court may, in its discretion, permit reinstatement or refiling of the motions. Albert, 393 A.2d at 992: Commonwealth v. Borden, 256 Pa. Super. 125, 389 A.2d 633

(1978);Boyd, 366 A.2d at 935. The same rules were applied to escapes when an appeal was pending. See Galloway, 333 A.2d at 743; Albert, 393 A.2d at 992-93.

One rationale for Pennsylvania's fugitive forfeiture rule "rest[ed] upon the inherent discretion of any court to refuse to hear the claim of a litigant who, by escaping, has placed himself beyond the jurisdiction and control of the Court, and, hence, might not be responsive to the judgment of the Court." Galloway, 333 A.2d at 743; see also Borden, 389 A.2d at 634. In Boyd, the Superior Court premised the fugitive forfeiture rule on a waiver rationale: "A defendant who runs away after having been convicted of the charge or charges against him waives his right to a judicial review of his case.... [The courts] encourage escapes and facilitiate the evasion of the justice of the state by extending to escaped convicts the means of

reviewing their convictions." Boyd, 366 A.3d at 935.[17]

None of above-cited Pennsylvania decisions, which reflect the state of the law at the time of petitioner's escape, applied the rule to claims arising after the petitioner was returned to the jurisdiction of the court or suggested that the rule should be so applied. Moreover, the rationales justifying this rule, as set

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[17]The language of the Feigley decision also suggests that a waiver theory justified the fugitive forfeiture rule:

> It is enough that [the defendant] obviously knew that by attempting an escape which he hoped would be permanent, he was deliberately bypassing the entire legal system. "Even though his action was uncounselled, in a very practical sense petitioner knowingly abandoned" the state court's adjudication of his federal claims.

Feigley, 838 F.2d at 32 (citations omitted)

forth in Galloway and Boyd, do not warrant application of this rule to such claims. Therefore, petitioner could not have known that his escape would waive claims that did not exist at that time. A state procedural bar is not independent and adequate where the

> defendant could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart [federal] review...applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.

Reynolds, 843 F.2d at 721 (citing NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58 (1958).

Simply because the Superior Court determined that Clark's claims were waived does not mean that the fugitive forfeiture rule was stated in unmistakable terms. In its decision, the Superior Court did not distinguish between petitioner's claims

arising before and after his recapture,[18] a distinction which is crucial in light of the rationales for the fugitive forfeiture rule and of the fact that no other court in Pennsylvania had extended this rule to such claims. As stated by the Court of Appeals in Reynolds, 843 F.2d at 270:

> Where a purported new, sweeping procedural requirement is not even explicitly formulated in the opinion upon which the state courts rely to deny review, however, it lacks the requisite degree of specifically and clarity--in short, the "unmistakable terms"--necessary to bar federal courts from habeas review.

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[18]The basis for the Superior Court's decision is not clear. The Court concluded "that the trial court did not abuse its discretion in declining to reinstate appellant's post-trial motions even after he was returned to its jurisdiction." Clark, 446 A.2d at 634. Notwithstanding the Court's express reference to Clark's post-trial motions, the Court dismissed all of petitioner's claims (except his competence to stand trial), including those arising following recpature which were not set forth in the post-trial motions.

Second, the Superior Court's invocation of the fugitive forfeiture rule is not consistent with other state decisions. There is a "tangible absence of authority", see Reynolds, 843 F.2d at 722, thus making it difficult for me to determine the consistency issue. Notwithstanding this paucity of case law, I conclude, based primarily on the rationales for the fugitive forfeiture rule in existence at the time of Clark's escape, that the Superior Court applied the fugitive forfeiture rule inconsistently. Petitioner was in custody when he was sentenced and at all times thereafter; thus, he was never unresponsive to the state court's judgment. Moreover, by escaping Clark could not have

waived knowingly or voluntarily claims not yet in existence.[19]

For the foregoing reasons, I conclude that the fugitive forfeiture rule

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[19]The issue of the inconsistent application of the fugitive forfeiture rule in Pennsylvania has been raised. See Report and Recommendation, at 13-14; Respondent's Memorandum on Jurisdiction and Procedural Default, at 6-8; Respondent's Objections, at 3-4; Petitioner's Memorandum sur Jurisdiction and Procedural Default, at 3-5. Although I sense some modification of the Galloway approach in Commonwealth v. Passaro, 504 Pa. 611, 476 A.2d 346 (1984), as did the Court of Appeals in Feigley, 833 F.2d at 32, I find the distinctions irrelevant for two reasons. First, I must look to the law at the time of petitioner's escape, when such purported inconsistency did not exist; courts had the discretion to grant or deny reinstatement or refiling of the motions. Second, no case, either prior or subsequent to 1979, involves claims arising after recapture. I do not agree with respondent's contention that extending the fugitive forfeiture rule to petitioner's claims is an exercise of discretion under the existing rule. Cf. United States v. Holmes, 680 F.2d 1372 (11th Cir. 1982) (per curiam), cert. denied, 460 U.S. 1015 (1983) (in dicta, courts stated that claims arising at sentencing not waived by prior escape).

is not an independent and adequate bar to habeas relief.

D. THE MERITS OF THE 1974 PETITIONS

Petitioner contends that his constitutional rights were violated by the state trial court's failure to conduct a hearing to determine whether he should have been tried as an adult for the 1973 sexual assaults, and the failure of his trial counsel to discover petitioner's true age and to notify the Court of this fact.

1. Reviewability

Under the doctrine of United States v. Tucker, 404 U.S. 443, 448 (1972), resentencing is required when a judge considers previous convictions that were unconstitutionally obtained. In Tucker, the trial court gave specific consideration to two prior convictons that were infirm constitutionally because tey were obtained without the assistance of counsel, in

violation of Gideon v. Wainwright, 372 U.S. 335 (1963). Tucker, 404 U.S. at 443; see United States ex rel. Fletcher v. Walters, 526 F.2d 359 (3d Cir. 1975). The Tucker Court remanded the case for resentencing because the "sentence [was] founded at least in part upon misinformation of constitutional magnitude." Id. at 447;[20] see also Thomas, 583 F. Supp. at 710. The only relief permitted under Tucker is resentencing on the subsequent conviction, which is the only relief petitioner seeks in this case. See Amended Petition for Habeas Corpus, No. 86-6813, at 5.

Because petitioner seeks relief only from the sentence imposed in 1980, I

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[20]The rationale behind the Tucker decision is that a sentencing judge might view a defendant differently if the judge is aware that the defendant was convicted and imprisoned unconstitutionally in the past. 404 U.S. at 448.

may review the constitutionality of the 1974 convictions even though I have found supra pp. 2-6, that the custody requirement was not satisfied as to the petitions challenging those convictions. Accord Thomas, 583 F. Supp. at 707 (Tucker doctrine gives court jurisdiction to review prior conviction); cf. Fletcher, 526 F.2d at 361-62 (petitioner challenging sentence pursuant to Tucker need not exhaust underlying constitutional claims). At oral argument, counsel for respondent did not dispute that review of the 1974 convictions under Tucker and Fletcher is proper.[21]

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[21]On December 7, 1973, petitioner was arrested on charges relating to two separate sexual assaults, which occurred on November 5 and November 26, 1973. He pled guilty to charges arising out of the November 5 incident and was found guilty, following a bench trial, of charges arising out of the November 26 incident.

Respondent argues, apparently for the first time at oral argument, that the

(Footnote Continued)

"A successful challenge to a presumptively valid sentence based on Tucker...requires three elements: (1) a prior conviction rendered invalid by Gideon; (2) the sentencing judge's mistaken belief that the prior conviction was valid; and (3) enhancement of the defendant's sentence because of it." Farrow v. United

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(Footnote Continued)
guilty plea waived the claims asserted in Civil Action No. 85-6177, except any claims attacking the voluntary and intelligent character of the plea. In support of its argument, respondent cites McMann v. Richardson, 397 U.S. 759 (1970); Siers v. Ryan, 773 F.2d 37 (3d Cir. 1985), cert. denied, ___ U.S. ___, 57 U.S.L.W. 3688 (1989); and United States ex rel. Davis v. Johnson, 495 F.2d 335 (3d Cir.), cert. denied, 419 U.S. 878 (1974).

The constitutional claims raised in No. 85-6178 are identical to those raised in No. 85-6177, at 3-5, with Amended Petition for Writ of Habeas Corpus, No. 85-6178, at 3-5. Respondent does not allege that the claims raised in No. 85-6178 are unreviewable. Thus, even assuming petitioner waived the due process and ineffective assistance of counsel claims set forth in 85-6177, they are preserved in 85-6178.

States, 580 F.2d 1339, 1344 (9th Cir. 1978); cf. Fletcher, 526 F.2d at 362-64 (applying Tucker analysis). I do not decide whether the Tucker doctrine extends to claims of violations of due process and of violations of the right to effective assistance of counsel[22], nor do I decide

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[22]A number of Courts have extended Tucker to convictions invalidated on constitutional grounds other than the lack of representation by counsel. See, e.g., Jefferson v. United States, 488 F.2d 391, 393 (5th Cir. 1974) (Fifth Amendment right against self-incrimination); Martinez v. United States, 464 F.2d 1289, 1290-91 (10th Cir. 1972) (invalid statutory presumption); see also Thomas, 583 F. Supp. at 710 (citing cases); cf. Zant v. United States, 452 U.S. 862 (1983) ("As we held in [Tucker]...the sentence must be set aside if the trial court relied at least in part on 'misinformation of a constitutional magnitude' such as prior uncounselled convictions...."). But see Tisnado v. United States, 547 F.2d 453, 457-59 (9th Cir. 1976) (conviction obtained in violation of Fourth Amendment, a claim fully litigated in the state courts, not invalid under Tucker). The Court of Appeals for the Ninth Circuit has held that Tucker applies to a conviction invalidated

(Footnote Continued)

whether the 1980 sentence was enhanced by the allegedly invalid convictions[23] because I find that these convictions were not obtained in violation of petitioner's constitutional rights.

(Footnote Continued)
because of the ineffective assistance of counsel. Brown v. United States, 610 F.2d 672, 675 (9th Cir. 1980) ("Although Tucker's scope remains uncertain in other areas,... it is clear that the right to the assistance of counsel and the right to effective assistance of counsel are constitutional equivalents.").

[23]"[M]ere knowledge of invalid convictions by a sentencing judge does not necessitate resentencing. Tucker proscribes consideration of invalid sentences, not mere knowledge of those convictions." Fletcher, 526 F.2d at 363 (footnote and citation omitted). In Fletcher, the sentencing judge "implicitly referred" to the previous convictions. Id. The Court concluded that "we are of the opinion that the principles of Tucker are best effectuated by resolving any doubts we might have on this issue in favor of resentencing." Id. at 364.

The facts in this case which suggest that the sentencing judge considered the petitioner's prior convictions are set forth supra p. 4 & n.7.

2. Violation of Due Process

The failure of the state trial court to provide petitioner with a juvenile certification hearing pursuant to 42 Pa. Cons. Stat. Ann. §6322 (Purdon Supp. 1988)[24] did not violate his due process rights.

It is undisputed that petitioner was 17 when he committed the crimes in 1973, and thus was a "child" as defined by 42 Pa. Cons. Stat. Ann. §6302 (Purdon 1982). In two arrest reports filed by the police, petitioner's birthday was recorded as March 20, 1954, signifying that he was 19. Two commitment orders entered in Family Court stated that petitioner's age was "19 years". See Exhibit C to Response

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[24]Because this case originated in criminal rather than juvenile court, the provisions of Section 6355, providing for transfer from juvenile to a criminal court, are not applicable.

to Petition for Habeas Corpus, No. 85-6178. A December 9, 1973 Pretrial Services Report stated "defendant says he is only 17." On that form, petitioner's date of birth was recorded as "3-23-57". The criminal complaint relating to the November 5 incident contained the notation "17 N/M", which means seventeen-year old negro male. See Exhibit C to Respondent's Memorandum on Jurisdiction and Procedural Default.[25] The opinion of Judge Blake denying Clark's Petition for Relief under the Post Conviction Hearing Act stated: "defendant was seventeen years of age when the offense was committed and the Court was not aware of defendant's actual age since the defendant represented that he was older at the time." See Opinion of Judge Blake, Exhibit B to

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[25]All of the facts heretofore cited in this paragraph are recited in the Report and Recommendation, at 3.

Response to Petition for Writ of Habeas Corpus, No. 85-6178, at 5.

Section 6322 provides: "if it appears to the court in a criminal proceeding that the defendant is a child,...the court shall forthwith halt further criminal proceedings, and, where appropriate, transfer the case to [juvenile court]..." In Commonwealth v. Harris, 223 Pa. Super. 11, 12, 297 A.2d 154 (1972), the Court held that non-age is not a jurisdictional matter; a court has a duty to transfer to juvenile court only "if non-age was ascertained during the pendency of the criminal charge." (empahsis in original). Although on its face the standard required by the term "ascertain" may be more rigorous than that imposed by "appear",[26] on the record

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[26]When Harris was decided, the Juvenile Act provided that: "If, during the (Footnote Continued)

before me I cannot conclude that it appeared to the state court that Clark was a juvenile. Accordingly, that court was not required under state law to conduct a hearing to determine whether transfer was appropriate.

The judge's failure to provide a hearing comported with due process as well as Pennsylvania law. A juvenile does not have a fundamental constitutional right to a juvenile certification hearing. The Supreme Court's decision in Kent v. United States, 383 U.S. 541 (1966) does not hold

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(Footnote Continued)
pendency of a criminal charge... it shall be ascertained that the person charged with the offense was under the age of sixteen at the time the alleged offense was committed, it shall be the duty of such court to transfer such case immediately...." 11 P.S. §256.

In Harris, the defendant, who was younger than 16 but told the court that he was 19, asserted that the criminal court had no jurisdiction over him. 223 Pa. Super. at 12.

to the contrary. Kent involved the transfer of a juvenile offender from the Juvenile Court, which had "exclusive jurisdiction" over the defendant, to the state court's general criminal jurisdiction. The governing statute provided expressly for a waiver of juvenile jurisdiction after "full investigation". Id. at 547-48. The Supreme Court concluded that a waiver was invalid unless the juvenile court provided an informal waiver hearing, at which the juvenile had the right to be represented by counsel and to have access to relevant documents, and unless the juvenile court provided a statement of reasons for the waiver. Id. at 561. "We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel." Id. at 557 (footnote omitted). In reaching this conclusion, the Court noted that the waiver of jurisdiction

"is a 'critically important' action determining vitally important statutory rights of the juvenile." Id. at 556.

In In re Gault, 387 U.S. 1, 12 (1967), the Supreme Court outlined the procedures necessary for an adjudication of delinquency. The Court stated: "Although our decision [in Kent] turned upon the language of the statute, we emphasized the necessity that 'the basic requirements of due process and fairness' be satisfied in such proceedings." (footnote omitted).

In United States ex rel. Turner v. Rundle, 438 F.2d 839, 841-42 (3d Cir. 1971), the Court of Appeals evaluated a transfer from juvenile to criminal court, concluding that "it is our view that Kent, particularly in light of the Supreme Court's subsequent opinion in [Gault], sets forth certain principles of constitutional dimension." The Court found that the constitutional requirements prescribed by

Kent included giving the juvenile due notice of the charges against him, access to certain records, the right to present evidence and cross-examine witnesses, and a statement of the reasons for the waiver. Id. at 842.[27]

These cases do not hold that the due process clause requires that a "transfer" or "certification" or "waiver" hearing must always be conducted in a case involving a juvenile; rather, these cases hold that any hearing provided by the state must

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[27] In a transfer from juvenile to criminal court, the Pennsylvania courts have consistently required a statement of reasons for the transfer. See, e.g., Commonwealth v. Depeller, 314 Pa. Super. 368, 460 A.2d 1184, 1186-87 (1983) (citing cases).

Other courts have imposed requirements on transfer hearings in accordance with Kent. See Geboy v. Gray, 471 F.2d 575, 578-79 (7th Cir. 1973) (reasonable notice of waiver hearing and representation by counsel required); Haziel v. United States, 404 F.2d 1275 (D.C. Cir. 1968) (participation of juvenile required).

contain certain procedural safeguards. Cf. United States ex rel. Galvan v. DeRobertis, 530 F. Supp. 487, 495 (N.D. Ill. 1981) ("This Court cannot read into the Due Process Clause a requirement that a hearing always be provided, even when not requested by the juvenile's counsel.") (emphasis in original). Because state law did not require a hearing until petitioner's true age appeared to the trial court, the trial court's failure to conduct a hearing in this case did not violate petitioner's constitutional rights.

3. Ineffective Assistance of Counsel

Petitioner's trial counsel was not ineffective by reason of his failure to ascertain the age of his client and to inform the state trial court that his client was a juvenile at the time the offenses were committed.

A habeas petitioner seeking relief based on a claim based on ineffective assistance of counsel

> [f]irst must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

United States v. Dawson, 857 F.2d 923, 927 (3d Cir. 1988) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984). Thus, petitioner must prove both incompetence and prejudice. See Kimmelman v.

Morrison, 477 U.S. 365, 381 (1985) (citing Strickland).[28]

Petitioner has failed to show that his trial counsel acted incompetently. The applicable standard is whether, considering all of the circumstances at the time of counsel's conduct, the conduct was reasonable. Strickland, 466 U.S. at 688. My scrutiny of counsel's actions must be highly deferential. Id. at 689. Petitioner must overcome the presumption that counsel's challenged acts or omissions were based on trial strategy. Id.

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[28]To determine whether a hearing on an ineffectiveness claim is warranted, I must consider as true all of petitioner's nonfrivolous factual allegations, then consider whether these claims fail to show ineffectiveness conclusively. Dawson, 857 F.2d at 927-28. Because I find petitioner's nonfrivolous allegations fail conclusively to demonstrate counsel's incompetence and prejudice to petitioner, a hearing is not required.

It is unknown from the present record whether counsel was aware of petitioner's preliminary hearing and indictment, where the available information suggested that petitioner was not a juvenile. See Exhibit C to Response to Petition for Habeas Corpus, No. 85-6178. Even if a reasonably competent attorney would have investigated Clark's age, a competent attorney may have failed to disclose this information to the criminal court as a matter of trial strategy. Cf. Commonwealth v. Pettus, 492 Pa. 558, 424 A.2d 1332 (1981) (under Pennsylvania law, Court declined to adopt per se rule of ineffectiveness for failing to petition for transfer of a juvenile charged with murder because this decision "can be a matter of trial strategy"). Petitioner had an extensive juvenile record, he was nearing his majority, and the crime involved a brutal sexual assault; counsel may have

thought that petitioner would receive a more favorable disposition as a first offender in criminal court. Petitioner has not produced any evidence to rebut the presumption imposed by Strickland.

More importantly, however, petitioner has failed to show that he was prejudiced by his counsel's inaction. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 667. Therefore, in this case, petitioner must demonstrate that had counsel discovered his age and alerted the trial court, he probably would have been transferred to juvenile court. See Commonwealth v. Wallace, 495 Pa. 295, 433 A.2d 856 (1981) (ineffectiveness not shown when counsel failed to petition for transfer to juvenile court because appellant failed to show that petition probably would

have been successful and that defendant was harmed by counsel's failure). In addition to petitioner's juvenile record and the violent nature of the crime, the responsent would have introduced the following evidence at the transfer hearing: (1) petitioner had escaped from juvenile detention facilities previously; (2) at the time of the assault, petitioner was an escapee from a juvenile detention facility; and (3) there was an outstanding bench warrant for petitioner at the time of his arrest. See Response to Petition for Habeas Corpus, Nos. 85-6177, 85-6178, at 15. Petitioner has not shown that if a hearing had been conducted, it is likely that he would have been transferred to juvenile court.

In addition, petitioner has not shown that, even if he had been transferred to juvenile court, he would have received a more favorable disposition there. As a first-time offender in criminal court, he

received a sentence of three to twenty-three months' incarceration and three years' probation for charges arising out of the November 3 incident, and a sentence of eleven to twenty-three months on work release for charges arising out of the November 26 incident. Respondent argues that considering petitioner's juvenile record and his history of escapes, he could have been sent to a juvenile detention facility until he was twenty-one years of age. Petitioner has not made the showing of prejudice required by Strickland.

E. THE MERITS OF THE 1979 PETITION

1. Failure to Reinstate Post-Trial Motions

In his amended petition for writ of habeas corpus, petitioner alleges that he was denied the effective assistance of counsel by his trial counsel's failure to advocate reinstatement of the post-trial motions. Even if such an omission

constituted incompetence, petitioner has failed to make the showing required under Strickland that he was prejudiced by it: he has not demonstrated that the state trial court probably would have reinstated the motions upon his return to the jurisdiction, see supra pp. 13-14, or that the motions probably would have been granted by the court.[29] Finally, petitioner seeks no separate relief for this alleged wrong.

2. Failures Related to Prior Convictions

Petitioner further alleges that his trial counsel was ineffective because he failed to present evidence or to argue

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[29]The fact that Judge Guarino noted in his opinion dismissing petitioner's post-trail motions that "the defendant in the instant case did not refile or ask that his motions be reinstated or argued," is insufficient to show a probability that petitioner would have prevailed in these motions. Exhibit B to Respondent's Memorandum on Jurisdiction and Procedural Default, at 3.

that the petitioner was a juvenile when his prior offenses were committed. I have already found that these prior convictions were proper, see supra pp. 20-27; therefore, it was reasonable for counsel not to argue a meritless claim. Moreover, counsel's failure was not prejudicial to petitioner; petitioner himself informed the sentencing judge that he was seventeen when he committed the 1973 crimes. Exhibit A to Respondent's Memorandum on Jurisdiction and Procedural Default, at 17-20. In addition, even if petitioner had been found to be delinquent in juvenile court in 1974, these adjudications could have been considered by the sentencing judge in 1980. 42 Pa. Cons. Stat. Ann. §6354 (Purdon 1982).

For the foregoing reasons, I conclude that the three petitions should be dismissed. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES CLARK	:	CIVIL ACTION
V.	:	
	:	NOS. 85-1677
COMMONWEALTH OF	:	85-6178
PENNSYLVANIA, et al.	:	85-6813

O R D E R

AND NOW, this 31st day of May, 1989, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that these petitions are DISMISSED.

THOMAS N. O'NEILL, Jr., J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES CLARK	:	CIVIL ACTION
V.	:	
	:	NOS. 85-1677
COMMONWEALTH OF	:	85-6178
PENNSYLVANIA, et al.	:	85-6813

O R D E R

AND NOW, this 1st day of June, 1989, it is hereby ORDERED that my Order of May 31, 1989, is AMENDED to include the following:

There is probable cause for appeal.

THOMAS N. O'NEILL, JR. J.

ORIGINAL

Supreme Court, U.S.
FILED
MAY 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

89-1662

NUMBER 89-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RONALD D. CASTILLE, District Attorney
of Philadelphia County;
DONALD T. VAUGHN, Superintendent,
State Correctional Institution at
Graterford, and ERNEST D. PREATE, JR.,
Attorney General of Pennsylvania,
Petitioners

V.

JAMES CLARK,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT FO CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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I. QUESTIONS PRESENTED

A. Has the state waived any defense of laches under Rule 9(a) by not raising this issue in the district court or in the appeal to the circuit court?

B. Does this Court's decision in United States v. Tucker require resentencing where the sentencing judge relied on prior convictions that were unconstitutional because they were obtained in violation of the defendant's due proces right to a juvenile transfer hearing?

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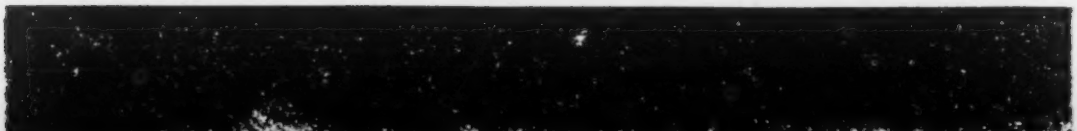

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IV. STATEMENT OF THE CASE

In 1973, while still a juvenile, respondent James Clark was charged with two assaults. Despite his juvenile status, Mr. Clark was prosecuted in the adult criminal court system and was never given a "transfer hearing" to determine whether he should be treated as a juvenile.

Contrary to the suggestion in the state's petition, there is no evidence that Mr. Clark at any time misstated his age. In fact, the record shows that when he was interviewed by Pretrial Services Division (an investigative branch of the Philadelphia Court System which gathers bail information), Mr. Clark stated that he was "only 17". This statement was recorded in the Pretrial Services report along with a date of birth which also indicated that Mr. Clark was a juvenile. In addition, the complaint in the first assault stated at the top, right after Mr. Clark's name, that he was a seventeen year old negro male ("17 N/M"). Both the Pretrial Services report and the complaint were placed in the official court file (known as the "Quarter Sessions file"). The record also shows, however, that the police arrest reports and the committment orders stated Clark's age as nineteen. The source of this erroneous information is not known.

Clark was represented by the same attorney in both cases. Clark alleged in his sworn applications that this attorney never

interviewed him or his family before trial to determine his correct age. The attorney never moved for a transfer to juvenile court.

In 1974 Clark pled guilty in the first assault case to conspiracy and attempted rape, and he was sentenced to a term of imprisonment of three to twenty-three months. In the second case, Clark was found guilty in 1974 of felonious restraint and sentenced to a term of imprisonment of eleven and one-half to twenty-three months.

In 1979 Clark was convicted of rape and robbery. At the sentencing in 1980, the prosecutor argued for a heavy sentence based on Clark's prior criminal convictions, and the judge, stating that he was considering the prior convictions, sentenced him to an aggregate term of twelve to twenty-five years in prison.[1]

Clark collaterally attacked his 1974 convictions in 1980 by filing a petition under the Pennsylvania Post-Conviction Hearing Act ("PCHA"), 42 Pa. Cons. Stat. Ann. §6322 (Purdon 1982). Clark argued that the adult court did not have jurisdiction since he was a juvenile, and that his defense counsel in 1974 and 1980 were ineffective for not raising this issue. The hearing court denied Clark's petition, finding that neither the court nor Clark's counsel in 1974 were aware of his true age. The court's decision

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[1] Although Clark told the sentencing judge that he was only 17 years old at the time of the prior offenses, defense counsel did not argue that these convictions were invalid or point out that Clark had been unjustly incarcerated as an adult without benefit of a transfer hearing. The state's characterization of the sentence as lenient is without support in the record. Moreover, under Pennsylvania law, Clark would not have been entitled to release automatically upon completion of the minimum part of his sentence since his parole had to be approved by the judge.

was upheld on appeal.

In 1985 and 1986 Clark filed two federal habeas corpus petitions attacking his two 1974 convictions, and a third petition attacking his 1979 conviction on the ground that his sentence in that case was improperly enhanced by the 1974 convictions. A United States magistrate recommended that the petitions be granted.[2] The district court rejected the magistrate's recommendation, and Clark appealed to the Third Circuit Court of Appeals.

The Third Circuit reversed the district court and remanded for resentencing on the 1979 conviction without consideration of the two 1974 convictions which the court found were unconstitutional. Initially, the court addressed the state's argument, raised at oral argument, that Clark had not exhausted his claim that the lack of a transfer hearing rendered his 1974 convictions unconstitutional.[3] Noting that this issue had not been addressed by the district court, the circuit court declined to conduct its own search of the record to determine whether the requirements of exhaustion were

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[2] The state inaccurately asserts in its petition for a writ of certiorari that the magistrate was the first to raise the argument that the 1974 convictions violated due process. While he may have not used the exact same language, Clark, in his amended habeas corpus petition filed May 5, 1987, argued that the two 1974 convictions were improper because Clark was a juvenile and did not have a transfer hearing. Thus, he argued, it was improper for the court to consider these convictions in sentencing Clark for the 1979 conviction, and defense counsel was ineffective for not raising this argument at that sentencing.

[3] The state never litigated this exhaustion argument in the district court, and it did not raise the argument in its brief to the Third Circuit.

met. Thus, the court expressly avoided deciding whether the due process claim had been fairly presented in the state courts. The court did not remand for reconsideration of the exhaustion issue by the district court because the case was already very old and such a remand would cause further delay and perhaps further appeals.[4] Instead, the court found that the requirement of exhaustion would be excused here since it would be futile at this late date for Clark to go back to the state courts to present his due process claim: if Clark, hypothetically, were to file a PCHA petition with the state courts in 1990, this hypothetical petition would be procedurally barred under state law because of prejudicial delay (A-15 - A-27). The court never stated, however, that the actual habeas corpus petitions filed by Clark were unreasonably delayed or that the state had been in fact prejudiced by any such delay.

Reaching the merits of Clark's due process claim, the court found that the facts had not been adequately developed at the state court hearing, and accordingly, could not be presumed to be correct. The court then found that the trial court in 1974 should have been aware of Clark's true age, and that its failure to provide Clark with a transfer hearing violated Clark's right to due process. This due process violation rendered the 1974 convictions unconstitutional, and their use at Clark's sentencing in 1980 was likewise unconstitutional. The court accordingly remanded the 1980

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[4] Clark has already served nearly ten years of his twelve to 25 year sentence. His minimum release date from Graterford State Penitentiary is August 6, 1992. Since the remedy requested in this case is resentencing, any further delay could render his habeas petition effectively moot.

case for resentencing without consideration of the 1974 convictions.

At no point prior to the decision of the Third Circuit did the state raise, as it does now, the affirmative defense of laches codified in Rule 9(a) of the Rules Governing Section 2254 Cases In the United States District Courts. While the case was before the district court, moreover, the state never alleged or attempted to prove under Rule 9(a) that Clark unreasonably delayed in filing his federal habeas petitions, or that the state was in any way prejudiced by such delay. Rather, the Rule 9(a) issue was raised for the very first time in the state's petition to the Third Circuit for a rehearing en banc. This petition for rehearing was denied on January 25, 1990.

V. SUMMARY OF ARGUMENT

The state has waived the affirmative defense of laches, codified in Rule 9(a) of the Rules Governing Section 2254 Cases In The United States District Courts, by not raising this defense at the district court level. There is no basis, moreover, either in the district court record or in the opinion of the circuit court to conclude that there was any prejudicial delay in Clark's filing of his habeas petitions. Thus, Rule 9(a) would not apply in any event. This issue, accordingly, is not worthy of review by the Supreme Court.

The circuit court's application of United States v. Tucker, 404 U.S. 443 (1972), to the facts of this case does not place the circuit in conflict with any other circuits or with the opinions of this Court. While Tucker invalidated a sentence that had been based in part on prior uncounseled convictions, the reasoning of that decision was not limited to violations of the right to counsel. In applying Tucker to the instant case, where the prior convictions were unconstitutional because of due process violations, the Third Circuit was following Tucker and was consistent with the circuits that have considered analogous issues. This Court, therefore, should not grant the writ of certiorari.

VI. REASONS THE WRIT SHOULD BE DENIED

POINT I

THIS COURT SHOULD NOT GRANT THE WRIT FOR THE PURPOSES OF REVIEWING THE RULE 9(a) LACHES ISSUE BECAUSE (A) THE STATE HAS WAIVED THIS AFFIRMATIVE DEFENSE BY NOT RAISING IT EARLIER, AND (B) NEITHER THE CIRCUIT COURT NOR THE DISTRICT COURT FOUND THAT CLARK UNREASONABLY DELAYED IN FILING HIS HABEAS CORPUS PETITIONS OR THAT THE STATE HAD BEEN PREJUDICED BY ANY DELAY.

The state never raised at the district court level or in the appeal to the circuit court the affirmative defense of laches codified in Rule 9(a) (Rules Governing Section 2254 Cases In the United States District Courts). The state has therefore waived this defense. Moreover, since this defense was not litigated below, there is no factual basis for concluding that under Rule 9(a), Clark's habeas petition should have been dismissed. The application of Rule 9(a) to this case, therefore, is not an appropriate issue on which to grant a writ of certiorari.

A. The state has waived the affirmative defense of Rule 9(a).

Rule 9(a) codifies the doctrine of laches as applied to federal habeas corpus petitions and it gives the government "what is in essence an equitable affirmative defense." United States v. Gutierrez, 839 F.2d 648, 651-52 (10th Cir. 1988). The government thus bears the burden of pleading and proving this defense and,

"[a]s with other affirmative defenses, this one is waived if it is not asserted in a timely fashion, in this case, in the answer to the petition." Liebman, Federal Habeas Corpus Practice and Procedure, vol. I, at 327, n. 13 (1988). This Court, moveover, has clearly expressed its "reluctance to adopt rules that allow a party to withhold raising a defense until after the 'main event' -- in this case, the proceeding in the District Court -- is over." Granberry v. Greer, 481 U.S. 129, 132 (1987). Under Rule 9(a), then, the government's burden is to plead and prove at the district court level that the habeas petitioner unreasonably delayed in filing his petition, and that this delay prejudiced the government in its ability to respond. McDonnel v. Estelle, 666 F.2d 246, 251-53 (5th Cir. 1982). Circuits that have addressed the issue agree that the government must give the habeas petitioner notice of this Rule 9(a) defense, and the petitioner must have an opportunity to explain the delay and establish facts in support. Id; United States v. Gutierrez, 839 F.2d 648, 651 (10th Cir. 1988); Hill v. Linahan, 697 F.2d 1032, 1034 (11th Cir. 1983).

Here, the state has clearly waived the Rule 9(a) defense by not raising it in the district court. In addition, the state has failed to give Clark the required notice of its intent to rely on this defense or the opportunity to establish facts explain any delay that did occur. The circuit court, accordingly, acted properly in not addressing this issue, especially since the state waited until after the circuit court had issued its opinion to raise the defense. This issue, moreover, is not one over which the

circuit courts are in conflict. No circuit has ever ruled that a habeas petition should be dismissed when that defense had not been raised in the district court. This Court, therefore, should not grant certiorari.

B. Neither The Circuit Court Nor The District Court Found That The Elements Of The Rule 9(a) Defense Were Present In This Case

The state entirely misunderstands the opinion of the circuit court of appeals in this case. Contrary to the state's assertions in its petition, the circuit court did not find that Clark's due process claim had been waived in the state courts. Nor did the court find that Clark had delayed 16 years in filing his habeas petition, or that the state had been in fact prejudiced by any delay. Rather, the Court expressly stated that it would not conduct its own search of the record to determine whether the due process claim had been fairly presented to the state courts. Instead, it sought "alternate recourse to resolve the exhaustion issue" (A-19) which the state first raised at oral argument. The court held that the exhaustion requirement should be excused in this case since it would be futile for Clark to return to the state courts at this late date. In the context of this discussion of exhaustion, the court reasoned that if Clark, hypothetically, were to file a petition in state court today, it would be procedurally barred under state law because of prejudicial delay. Here, however, the court was referring only to a hypothetical petition,

not to the actual federal habeas petitions filed by Clark in 1985 and 1986. The court never stated that those actual petitions were unreasonably delayed, or that the state had been prejudiced.

Accordingly, there is simply no factual basis presented in the opinion of the circuit court or elsewhere in the record to support the state's claim of prejudicial delay under Rule 9(a). The issue therefore does not merit review by this Court.

POINT II

THIS COURT SHOULD NOT GRANT THE WRIT FOR THE PURPOSES OF REVIEWING THE APPEALS COURT'S APPLICATION OF TUCKER TO THE FACTS OF THIS CASE BECAUSE THE APPEALS COURT'S OPINION FOLLOWS LOGICALLY FROM TUCKER AND THE CIRCUIT COURTS ARE NOT SPLIT ON THIS ISSUE.

The decision of the Circuit Court here was clearly compelled by this Court's reasoning in United States v. Tucker, 404 U.S. 443 (1972). No other circuit court opinions, moreover, are in conflict with the Third Circuit on this issue. This case therefore does not present an issue appropriate for review by the Supreme Court, and the petition for a writ of certiorari should be denied under Rule 17.1 of the Rules of the Supreme Court of the United States.

In Tucker, this Court ordered resentencing because the sentencing judge had considered prior uncounseled convictions that were in violation of Gideon v. Wainwright, 372 U.S. 335 (1963). Although the specific facts of Tucker thus involved a Gideon violation, the Court did not limit its reasoning to these facts. Speaking in general terms, the Court stated:

> For the real question here is not whether the results of the Florida and Louisiana proceedings might have been different if the respondent had counsel, but whether the sentence in the 1953 federal case might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained. [Footnote omitted.]

> We agree with the Court of Appeals that the answer to this question must be "yes." For if the trial judge in 1953 had been aware of the constitutional infirmity of two of the previous convictions, the factual circumstances of the respondent's background would have appeared in a dramatically different light at the sentencing proceeding.

404 U.S. at 448.

It may be said with equal force that the real question in Clark's case is whether the sentence in the 1980 case might have been different if the sentencing judge had known that both of Clark's prior convictions had been unconstitutionally obtained. The answer must be "yes." If the judge in 1980 had been aware of the constitutional infirmity of the two prior convictions, the factual circumstances of Clark's background would have appeared in a dramatically different light at the sentencing proceeding.

A Gideon violation, moreover, is closely analogous to the due process violation that Clark suffered when he was not given a transfer hearing in 1974 to determine, as required under Kent v. United States, 383 U.S. 541, 557 (1966), whether he should be treated as a juvenile. Both types of constitutional violations go to the very integrity of the conviction. Just as assistance of counsel could avert a criminal conviction, so too, a transfer hearing could avert a criminal conviction by resulting in the defendant being treated as a juvenile instead of as an adult.

The difference between a criminal conviction and an adjudication of delinquency is fundamental. Indeed, the very premise of the Pennsylvania's Juvenile Act is that juveniles should be spared the onus of an adult criminal conviction. Instead of

punishment, the prime consideration is the best interests of the child and rehabilitation. See 11 P.S. §50-101(b)(2), recodified at 42 Pa.C.S.A. §6301(b)(2). A juvenile, for this reason, is spared many of the collateral consequences of a criminal conviction. He does not, for example, have a "criminal record," and he can participate in specialized treatment programs designed for juveniles. The courts, accordingly, view an adjudication of delinquency in a very different light than a criminal conviction.

Two recent decisions of this Court inferentially support the proposition that the Tucker doctrine is not limited to Gideon violations. In Johnson v. Mississippi, 486 U.S. 578 (1988), the Court held that a death sentence was unlawful because the sentencing jury had considered a prior conviction which was invalid because of denial of the right to appeal. One of the issues the defendant had sought to raise on appeal involved the voluntariness of his confession. In Maleng v. Cook, 109 S.Ct. 1923, 1927 (1989), a habeas petitioner alleged that his sentence was invalid because the court had considered a prior conviction that was infirm because he had not been mentally competent. Although the Court limited its holding to the issue of jurisdiction, it did not question the proposition that resentencing would be required if the conviction were ruled invalid on grounds of incompetence. Thus, considering the reasoning of Tucker and more recent decisions of this Court, it is clear that the circuit court opinion here follows logically from these decisions.

Other circuit courts that have addressed issues analogous to

the Tucker issue in this case have held in accord with the Third Circuit. The Sixth Circuit in Canary v. Bland, 583 F.2d 887, 890 (1978), held that a defendant had been denied effective assistance of counsel by the failure of his attorney to challenge an invalid prior felony conviction that was used as a basis for a habitual offender charge. The prior conviction was invalid because of deficiencies in the juvenile transfer proceedings. In Grandison v. Warden, Maryland House of Correction, 580 F.2d 1231, 1241-43 (1978), cert. denied, 440 U.S. 918 (1979), the Fourth Circuit, following Tucker, remanded the case for the sentencing judge to state whether he had considered prior invalid convictions in sentencing the defendant. Those prior convictions were invalid because the defendant had been convicted under a juvenile statutory scheme that had been struck down.[5] Accord, United States v. Burt, 802 F.2d 330, 334-35 (9th Cir. 1986)(prior conviction which was invalid because of fifth amendment violation could not be used for purposes of dangerous special offender statute); Rutledge v. Sunderland, 671 F.2d 377, 381-82 (10th Cir. 1982)(prior conviction which was invalid because juvenile certification law violated equal protection could not be used as basis for recidivist conviction); Brown v. United States, 610 F.2d 672 (9th Cir. 1980)(Tucker extends

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[5] The state misinterprets Grandison when it argues that this decision is in conflict with the Third Circuit's decision in the instant case. Petition for Writ of Certiorari, p. 23. While the court in Grandison did hold that it would not extend Burgett v. Texas, 389 U.S. 109 (1967), to bar the use of the invalid prior convictions to impeach the defendant at his trial, the court nonetheless did not hesitate to apply Tucker in ruling that these same convictions could not be used to enhance the sentence. 580 F.2d at 1238 - 1243.

to claim that prior conviction was unconstitutional because of ineffective assistance of counsel); United States v. Martinez, 413 F.2d 61, 63 (7th Cir. 1969)(prior conviction which was invalid because it was based on an involuntary guilty plea could not be used to enhance punishment pursuant to second offender statute).

No circuits are in conflict with the Third Circuit opinion in this case. Contrary to the state's claim in its petition, there is no intra-circuit conflict with Third Circuit's earlier opinion in United States v. Graves, 554 F.2d 65 (1977). Graves dealt with a separate issue -- the use of a prior conviction as an element of an offense. The defendant was charged with possession of a firearm by a convicted felon, and he challenged the use of the prior felony on the grounds that he had been a juvenile at the time and was denied the due process requirements of Kent at his transfer hearing. The court held that Congress intended that all felons, even those whose prior convictions might be invalid, be prohibited from possessing firearms unless and until that invalidity was recognized by a court. In view of this intent, the court was unwilling to extend the protections of Burgett v. Texas, 389 U.S. 109 (1967),[6] to these facts. 554 F.2d at 80-83. In the instant case, however, Clark challenges the use of a prior invalid conviction to enhance his sentence, and there is no question of congressional intent. Graves is simply inapposite when prior convictions are used to determine

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[6] In Burgett v. Texas, the Court invalidated a conviction under a recidivist statute where the state had relied on prior convictions that were uncounseled in violation of Gideon v. Wainwright, supra.

punishment rather than to define the offense. See United States v. Clawson, 831 F.2d 909, 914 (9th Cir. 1987), cert. denied, 109 S.Ct. 303 (1988). For the same reasons, there is no conflict with the Sixth Circuit's opinion in United States v. Maggard, 573 F.2d 926 (1978), since that case also dealt only with the use of a prior conviction to define the offense.

The only limitation that circuit courts have placed on the scope of Tucker is a limitation that follows logically from this Court's decision in Stone v. Powell, 428 U.S. 465 (1976). There, this Court ruled that habeas relief would not be granted for fourth amendment violations where there had been an opportunity for full and fair litigation of the claim in the state courts. The Court's reasoning was that the principal purpose of the fourth amendment exclusionary rule is to deter police misconduct, and that this rationale was not sufficiently strong to warrant allowing collateral attacks based on fourth amendment claims. Based on this reasoning, the Ninth Circuit in Tisnado v. United States, 547 F.2d 452, 457 (1976), held that since a Tucker-type challenge to a prior conviction is essentially a collateral attack, relief would not be granted in such cases for fourth amendment violations as long as there had been a full and fair opportunity to litigate the claim. See also United States v. Penta, 475 F.2d 92 (1st Cir. 1972), cert. denied, 414 U.S. 870 (1973). Tisnado, therefore, is not in conflict with the Third Circuit opinion in this case, but rather, is an opinion dealing with a very different type of constitutional claim.

The circuit court opinion in this case, therefore, is not in conflict with either the precedents of this Court, or with the decisions of other circuit courts. The petition for a writ of certiorari should accordingly be denied.

Respectfully submitted,

DAVID L. McCOLGIN
Assistant Defender

IN THE UNITED STATES SUPREME COURT

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SUPREME COURT, U.S.

RONALD D. CASTILLE, District Attorney of Philadelphia County	:	
DONALD T. VAUGHN, Superintendent State Correctional Institute at Graterford	:	
and ERNEST D. PREATE, JR., Attorney General of Pennsylvania,	:	
	:	NUMBER 89 -
V.	:	
JAMES CLARK, Respondent	:	

CERTIFICATE OF SERVICE

I, David McColgin, Staff Attorney, Federal Court Division, Defender Association of Philadelphia hereby certify:

1. That I am a member of the Bar of this Court.

2. On May 25, 1990, I caused two copies of the Motion for Leave to Proceed Informa Pauperis, and the Respondent's Brief in Opposition to Petition for Writ of Certiorari to be deposited in the United States Post Office with first-class postage prepaid addressed to Gaele McLaughlin Barthold, Deputy District Attorney, Office of the District Attorney, 1421 Arch Street, Philadelphia, Pennsylvania 19102.

Respectfully submitted,

David McColgin

DAVID L. McCOLGIN

DATE: 5/25/90

Supreme Court, U.S.
FILED
JUN 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1662

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

RONALD D. CASTILLE, District Attorney
of Philadelphia County;
DONALD T. VAUGHN, Superintendent,
State Correctional Institute at
Graterford, and ERNEST D. PREATE, Jr.,
Attorney General of Pennsylvania
Petitioners

V.

JAMES CLARK,
Respondent

PETITIONERS' REPLY ON THE ISSUE OF WAIVER

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QUESTION PRESENTED

Have petitioners in this habeas corpus appeal waived a defense under Rule 9(a) where that defense first became applicable only after the Third Circuit Court of Appeals in its opinion below reinterpreted pertinent state law to impose an affirmative burden of proof on petitioners, which did not previously exist, and which the Third Circuit itself recognized was not capable of being met by petitioners due to the passage of time?

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NO. 89-1662

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Respondent

PETITIONERS' REPLY
ON THE ISSUE OF WAIVER

Contrary to respondent's contention, waiver considerations do not preclude this Court's review of petitioners' Rule 9(a) argument. According to respondent, petitioners waived any argument under Rule 9(a) by not raising the objection in the District Court or in the appeal to the Circuit Court. This argument must be rejected however, since it ignores the fact that the Rule 9(a) objection became applicable only after the

Third Circuit in its opinion substantially reinterpreted state law to impose an affirmative burden on petitioners to produce facts which could no longer be proven due to the passage of time from respondent's trials.

The interpretation given state law by the Third Circuit had not been the interpretation governing in either the state courts or the District Court below. Those courts interpreted the applicable state statute to require a showing by the defendant that it "appeared" to the adult court that the defendant was a child. The defendant's failure to object on the ground of his juvenile status, or his failure to correct the court's otherwise erroneous judgment as to the defendant's age precluded relief on this basis under this interpretation, even if the adult court's judgment proved by hindsight to be

erroneous. See Commonwealth v. Sims, 379 Pa. Super. 252, 549 A.2d 1280 (1988).

It was conceded by both parties in this case that neither respondent nor his attorney raised an objection at trial based on respondent's juvenile status. Since that dispositive fact was conceded, petitioners reasonably did not raise an objection in the District Court based on Rule 9(a).

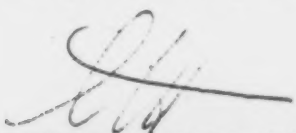
The Third Circuit in its opinion radically reinterpreted prior state law. It imposed a burden on the trial court to inquire into the juvenile status of any defendant before it; and it also placed the burden on the prosecution to prove that the inquiry had occurred. It is to this new interpretation, and its evidentiary requirements, that petitioners' Rule 9(a) objection applies. Had the Third Circuit remanded the case to the District Court for hearings in light of

its new interpretation, petitioners would have raised a Rule 9(a) objection. Since the Third Circuit chose instead to decide the merits of the case without a remand based on its own finding that petitioners could not meet that burden, petitioners had no opportunity to raise their Rule 9(a) objection, other than in a petition for rehearing, which was promptly filed, but denied. Since petitioners raised the Rule 9(a) objection at the first opportunity after it became relevant in the case, they did not waive the right to argue Rule 9(a), nor is this Court precluded from addressing the Rule 9(a) issue based on waiver.

CONCLUSION

For the foregoing additional reasons, the Commonwealth of Pennsylvania, through the named petitioners, respectfully requests that a Writ of Certiorari issue to review the decision of the Third Circuit.

Respectfully submitted,



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